156-237.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~1155~~. 667

CLYDE MATTOX, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED MARCH 24, 1894.

(15539.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1155.

CLYDE MATTOX, PLAINTIFF IN ERROR,

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THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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a UNITED STATES OF AMERICA, ss:

To the United States, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Kansas, wherein Clyde Mattox is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 16th day of March, in the year of our Lord one thousand eight hundred and ninety-four.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

I accept service of this citation this 21st day of March, 1894.

W. C. PERRY,
U. S. Atty., Dist. of Kansas.

b UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judge of the district court of the United States for the district of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, between the United States, plaintiff, and Clyde Mattox, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of March, in the year of our Lord one thousand eight hundred and ninety-four.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed to operate as a stay by—

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

1 THE UNITED STATES OF AMERICA,
District of Kansas, ss:

In the district court of the said United States in and for the said district, September term, 1891.

THE UNITED STATES OF AMERICA
vs.
CLYDE MATTOX
(Whose more full Christian name is unknown).
} Indictment for murder.

At the term of the district court of the United States of America in and for the said district of Kansas, begun and held at Wichita, in said district, on the seventh day of September, in the year of our Lord one thousand eight hundred and ninety-one, the grand jurors of the United States of America, duly impanelled, sworn, and charged to inquire of offenses committed within that part of the Indian Territory lying north of the Canadian River, and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, upon their oaths do find and present that Clyde Mattox (whose more full Christian name is to the grand jurors aforesaid unknown), late of that part of the public domain acquired by the United States of America by the act of Congress approved March 2d, 1889, commonly known as Oklahoma, and being a part of the district of Kansas aforesaid, on or about the 12th day of December, in the year of our Lord one thousand eight hundred and eighty-nine, at that part of the district of Kansas aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive juris-
2 diction of this court, with force and arms, in and upon the body of one John Mullen, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Clyde Mattox, with a certain revolving pistol then and there charged with gunpowder and leaden bullets, which said pistol he, the said Clyde Mattox, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off to, against, and upon the said John Mullen, and that the said Clyde Mattox with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Clyde Mattox discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said John Mullen, in and upon the right breast of him, the said John Mullen, giving to him, the said John Mullen, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Clyde Mattox, in and upon the right breast of him, the said John Mullen, one mortal wound of the depth of eight inches and of the breadth of half an inch, of which said mortal wound he, the said John Mullen, then and there died. And so the jurors aforesaid upon their oath aforesaid, do say that the said Clyde Mattox him, the said John Mullen, in the manner and by the means aforesaid feloniously, wilfully, and of his malice aforethought did kill and murder, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

3 *Second count.*

And the grand jurors aforesaid, upon their oaths aforesaid, duly impanelled, sworn and charged to inquire of offenses committed within that part of the Indian Territory lying north of the Canadian River, and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, upon their oaths do find and present that Clyde Mattox (whose more full Christian name is to the grand jurors aforesaid unknown), late of that part of the public domain acquired by the United States of America by the act of Congress approved March 2d, 1889, commonly known as Oklahoma, and being a part of the district of Kansas aforesaid, on or about the 12th day of December, in the year of our Lord one thousand eight hundred and eighty-nine, at that part of the district of Kansas aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States
4 and within the exclusive jurisdiction of this court, with force and arms, in and upon the body of one John Mullen, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Clyde Mattox, with a certain revolving pistol then and there charged with gunpowder and leaden bullets, which said pistol he, the said Clyde Mattox, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against and upon the said John Mullen, and that the said Clyde Mattox, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Clyde Mattox discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate and wound him, the said John Mullen, in and upon the back of him, the said John Mullen, giving to him, the said John Mullen, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said Clyde Mattox, in and upon the back of him, the said John Mullen, one mortal wound of the depth of nine inches, and of the breadth of half an inch; of which said mortal wound he, the said John Mullen, then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Clyde Mattox him, the said John Mullen, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

5 *Third count.*

And the grand jurors aforesaid, upon their oaths aforesaid, duly impanelled, sworn and charged to inquire of offenses committed within that part of the Indian Territory lying north of the Canadian River, and east of Texas and the one-hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, upon their oaths do find and present that Clyde Mattox (whose more full Christian name is to the grand jurors aforesaid unknown), late of that part of the public domain acquired by the United States of America by the act of Congress approved

March 2d, 1889, commonly known as Oklahoma, and being a part of the district of Kansas aforesaid, on or about the 12th day of December, in the year of our Lord one thousand eight hundred and eighty-nine, at that part of the district of Kansas aforesaid, the same being a place and district of country under the exclusive jurisiction of the United States,
6 and within the exclusive jurisdiction of this court with force and arms, in and upon the body of one John Mullen, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Clyde Mattox with a certain revolving pistol, then and there charged with gunpowder and leaden bullets, which said pistol he, the said Clyde Mattox in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against and upon the said John Mullen, and that the said Clyde Mattox with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Clyde Mattox discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate and wound him the said John Mullen in and upon the abdomen of him the said John Mullen, giving to him the said John Mullen then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said Clyde Mattox in and upon the abdomen of him the said John Mullen, one mortal wound of the depth of nine inches and of the breadth of half an inch; of which said mortal wound he, the said John Mullen, then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Clyde Mattox him the said John Mullen, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

P. L. SOPER,
Assistant U. S. Attorney, District of Kansas.

8 (Indorsed:) No. 900. United States vs. Clyde Mattox. Murder. A true bill. J. W. Hamilton, foreman. Filed Sept. 25th, 1891. J. C. Wilson clerk. By J. F. Sherman, D. C.

Witnesses.

Dr. W. R. Thompson, Thomas Whitman, Charity Whitman, Laura Walker, Joe Watson, Lizzie Walls, Elisha Hopkins, Nancy Bates, Lizzie Rowley, Oklahoma City. Geo. L. Walker, Thomas Roberts, Nick Brown, Capt. D. F. Stiles, C. W. Price, T. J. Woodson, Will R. Walter, J. N. Haynes, Martin Bates, Mrs. Woodson, Robert Williams, Morgan Wright, George Thornton, J. R. Jacobs, J. B. Koonce, H. E. Stanley, Joe Morris, John Naron, M. U. Naron, William Labaugh, H. B. Tracy, Miss Nanie McCall, Willie Wright, J. K. Hathaway, Mrs. Morgan Wright, John Hudson, Oklahoma City, Ok. Ty.; Mrs. John Hudson, Oklahoma City, Ok. Ty.; Joe Watson, Oklahoma City, Ok. Ty.; George Cooley, Oklahoma City, Ok. Ty.; G. W. Schlegel, Trainmaster,

Geo. L. Walker, Dr. Chas. Allin, Jas. H. Gill, Dr. A. J. Beale, Lee Patrick, P. L. Soper, C. Madsen, James Thompson, Mrs. Joe Watson, T. H. East.

9 UNITED STATES OF AMERICA, PLAINTIFF, *v.* CLYDE MATTOX, DEFENDANT. } Indictment for murder.

Comes now the defendant and demurs to the indictment herein, and each count thereof, because the same is insufficient in law to require him to answer, and because the indictment and each count thereof is uncertain and informal.

Wherefore defendant prays judgment, that the same be quashed.

JOHNSON & HOWARD, and
WILSON & MCMECHAN,
Attorneys for Defendant.

(Endorsed:) 900. U. S. of America vs. Clyde Mattox. Demurrer. Filed Oct. 5th, 1891. J. C. Wilson, clerk. By J. F. Sherman, D. C.

10 UNITED STATES OF AMERICA,
District of Kansas, ss.

At a term of the district court of the United States of America for the district of Kansas, begun and held at the city of Wichita, in said district, on Monday, the 21st day of September, 1891, proceedings were had, and appear of record in words and figures following, to wit:

MONDAY, *Oct. 5th*, 1891.

UNITED STATES OF AMERICA, PLAINTIFF, *v.* CLYDE MATTOX, DEFENDANT. } 900. Indictment for murder.

Now comes as well the plaintiff, by J. W. Ady, U. S. attorney, as the said defendant, by J. W. Johnson and T. F. McMechan, his attorneys, and the demurrer heretofore filed to the indictment herein being overruled, the said defendant excepted to the ruling of the court thereon, whereupon defendant, being arraigned on the indictment herein, pleads not guilty thereto.

11 Be it remembered, that at the term of the district court of the United States within and for the district of Kansas, begun and held at Wichita, in said district, on the fourth day of September, A. D. 1893, the following proceedings were had, to wit:

THURSDAY, *January 11th*, 1894.

THE UNITED STATES *vs.* CLYDE MATTOX. } 900. Indictment for murder.

Now comes as well the United States by W. C. Perry, U. S. attorney, and the said defendant Clyde Mattox in his own proper person and by

J. W. Johnson, Charles R. Redick, and D. C. Lewis, his attorneys, and the motion of the defendant, Clyde Mattox, heretofore filed for a continuance of this case came on to be heard, and was argued by counsel, and the court being fully advised in the premises ordered that said motion be overruled. To which order and ruling of the court the defendant Clyde Mattox at the time duly excepted.

THE UNITED STATES } 900. Indictment for murder.
vs.
CLYDE MATTOX. }

Now on this day this cause came on for trial, the United States appearing by its attorney, W. C. Perry, and the defendant appearing in his own proper person, and by his attorneys J. W. Johnson, Charles R. Redick, and D. C. Lewis. Thereupon both parties announcing themselves ready for trial came a jury, to wit: Robert Campbell, Geo. A. Collett, J. M. Essick, H. A. Barber, Richard Richardson, John E. Todd, S. M. Jackson, E. E. Lambert, W. C. Campbell, G. Rogers, L. G. McCauley and Amos B. Noldner, who having been examined as to their qualifications were duly impaneled and sworn to well and truly try the
12 matters submitted to them and a true verdict render according to the law and the *the* trial of this case is proceeded with, the hour of adjournment having arrived and the jury being admonished by the court as to their duties are by the court placed in charge of a sworn bailiff, further consideration of this case is postponed until to-morrow.

THE UNITED STATES OF AMERICA. } 900. Indictment for murder.
vs.
CLYDE MATTOX. }

Order.

Upon application of the United States district attorney for the appointment of a stenographer to write the testimony of witnesses in the above entitled cause, and the employment of a stenographer being deemed actually necessary, it is now, here by the court ordered that H. B. Tracy be and is hereby appointed to write the proceedings in the above cause.

JNO. A. WILLIAMS, *Judge.*

13 Be it remembered that at the term of the district court of the United States within and for the district of Kansas, begun and held at Wichita in said district on the fourth day of September, A. D. 1893, the following proceedings were had, to wit:

FRIDAY, *January 12th*, 1894.

THE UNITED STATES } 900. Indictment for murder.
vs.
CLYDE MATTOX. }

Now come the parties same as on yesterday, and the jury being called, answering to their names, the trial of this case is proceeded with by the introduction of evidence. The hour of adjournment having arrived, the jury being admonished as to their duties and in charge of a sworn baliff, further consideration of this cause is postponed until to-morrow.

14 Be it remembered that at the term of the district court of the United States within and for the district of Kansas, begun and held at Wichita in said district on the fourth day of September, A. D. 1893, the following proceedings were had, to wit:

SATURDAY, *January 13th*, 1894.

THE UNITED STATES }
vs. } 900. Indictment for murder.
CLYDE MATTOX. }

Now come the parties the same as on yesterday, and the jury being called, answering to their names, the trial of this case is proceeded with by the introduction of evidence. The hour of adjournment having arrived, the jury being admonished as to their duties and in charge of a sworn bailiff, further consideration of this cause is postponed until Monday morning.

15 Be it remembered that at the term of the district court of the United States within and for the district of Kansas, begun and held at Wichita in said district on the fourth day of September, A. D. 1893, the following proceedings were had, to wit:

MONDAY, *January 15th*, 1894.

THE UNITED STATES }
vs. } 900. Indictment for murder.
CLYDE MATTOX. }

Now come the parties same as on Saturday last and the jury being called, answering to their names, the trial of this case is proceeded with, and the jury having heard the evidence, arguments of counsel, and instructions of the court, retire, under the charge of a sworn bailiff, to consider their verdict. The hour of adjournment having arrived and the jury not being agreed to a verdict, further consideration of this case is postponed until to-morrow.

16 Be it remembered that at the term of the district court of the United States within and for the district of Kansas, begun and held at Wichita in said district on the fourth day of September, A. D. 1893, the following proceedings were had, to wit:

TUESDAY, *January 16th*, 1894.

THE UNITED STATES }
vs. } 900. Indictment for murder.
CLYDE MATTOX. }

Now come the parties same as on yesterday, the defendant being present in person and by his counsel and the jury being called answering to their names and return into court the following verdict, to wit: "In the district court of the United States for the district of Kansas. United States vs. Clyde Mattox, No. 900. We, the jury in the above entitled cause, duly empaneled and sworn upon our oaths, find the defendant, Clyde Mattox, guilty as charged in the indictment. L. G. Macauley, foreman."

Thereupon on request of the defendant and by his attorneys the said jury was polled by the clerk and each juror being called by name and being by said clerk asked in open court and in presence of the defendant, Clyde Mattox, whether the verdict aforesaid was his verdict, did then and there answer that it was.

17 In the district court of the United States for the district of Kansas.

UNITED STATES, }
vs. } No. 900.
CLYDE MATTOX. }

We, the jury in the above entitled cause, duly empaneled and sworn, upon our oaths, find the defendant, Clyde Mattox, guilty as charged in the indictment.

L. G. MACAULEY,
Foreman.

(Endorsed:) No. 900, The United States vs. Clyde Mattox. Verdict filed January 16th, 1894. Geo. F. Sharitt, clerk, by J. F. Shearman, D. C.

18 In the district court of the United States in and for the district of Kansas.

UNITED STATES OF AMERICA, }
vs. } Indictment for murder.
CLYDE MATTOX. }

Comes now the above-named defendant and moves the court to set aside the verdict heretofore rendered in said cause and grant a new trial and assigns the following reasons therefor, to wit:

First. Said verdict is against the weight of the evidence.

Second. Said verdict is not sustained by sufficient evidence.

Third. Said verdict is against the law.

Fourth. Said verdict is against the law and evidence.

Fifth. The court erred in the admission of testimony over the objection of the defendant.

Sixth. The court erred in refusing to admit testimony offered by the defendant in this, to wit: In refusing to admit the testimony of O. H. Violet and S. L. James of declarations made to them by the Government's witness, Thomas Whiteman, to the effect that his testimony given in this case was false.

Seventh. The court erred in admitting and permitting to be read to the jury the testimony of Thomas Whitman, against and over defendant's objection.

Eighth. The court erred in admitting and permitting to be read to the jury the testimony of George Thornton, against and over the defendant's objection.

Ninth. The court erred in refusing the instructions numbered from one to sixteen inclusive asked for by defendant.

Tenth. The court erred in refusing to give each of the instructions asked for by defendant.

19 Eleventh. The court erred in overruling defendant's demurrer to the indictment herein.

Twelfth. This court has no jurisdiction to try and determine said cause or to receive the verdict herein or render judgment thereon.

J. W. JOHNSON,
CHARLES R. REDICK,
D. C. LEWIS,
Att'ys for Defendant.

(Endorsed:) No. 900. United States of America vs. Clyde Mattox. Indictment for murder. Motion for new trial. Filed Jan'y 16, 1894. Geo. F. Sharitt, clerk.

20 In the United States district court within and for the district of Kansas.

THE UNITED STATES)
vs.
CLYDE MATTOX.)

Motion in arrest of judgment.

Comes now the defendant, Clyde Mattox, and moves the court to stay and arrest judgment herein, and for ground of this motion says:

First. That this court had no jurisdiction to try this defendant for the offense in the indictment herein charged, but should have by order remitted said indictment and action to the circuit court of said district of Kansas.

Second. That all the proceedings herein since the return of said indictment are void.

Third. That the court had no jurisdiction of the offense charged, or to receive the indictment herein, or to cause the apprehension of this defendant therein, for the reason that said offense does not appear to have been committed within said district of Kansas.

Fourth. That the court has not now authority or jurisdiction to pass sentence or judgment on this defendant herein.

CHARLES R. REDICK,
J. W. JOHNSON,
D. C. LEWIS,
Attorneys for Defendant.

(Endorsed:) No. 900. United States district court, district of Kansas. The United States versus Clyde Mattox. Motion in arrest of judgment. Filed Jan'y 26, 1894. Geo. F. Sharitt, clk. Charles R. Redick, J. W. Johnson, & D. C. Lewis, att'y for def'd't.

21 Be it remembered that at the term of the district court of the United States within and for the district of Kansas, begun and held at Wichita, in said district, on the fourth day of September, A. D. 1893, the following proceedings were had, to wit:

FRIDAY, *January 26th*, 1894.

THE UNITED STATES
vs. } 900. Indictment for murder.
CLYDE MATTOX

Now on this day come the parties hereto, the defendant, Clyde Mattox, in person and by his counsel, J. W. Johnson, Charles R. Redick, and D. C. Lewis, the United States being represented by W. C. Perry, United States attorney; and the court, having heard the argument of counsel and having fully considered the motion of the defendant, Clyde Mattox, to set aside the verdict and grant a new trial herein, heretofore filed in this action, and being fully advised in the premises, doth now here order and adjudge that said motion be, and the same is hereby, overruled. To which order and ruling of the court the defendant, Clyde Mattox, at the time said order and ruling was made then and there excepted.

THE UNITED STATES
vs. } 900. Indictment for murder.
CLYDE MATTOX

Now on this day come the parties hereto, the defendant, Clyde Mattox, in person and by his counsel, J. W. Johnson, Charles R. Redick, and D. C. Lewis, the United States being represented by W. C. Ferry, United States attorney, and the court, having heard the arguments of counsel on the motion of the defendant, Clyde Mattox, in arrest of judgment herein, and duly considered the same, and being fully advised in the premises,
22 doth now here order and adjudge that the said motion be, and the same is hereby, overruled. To which order and ruling of the court the said defendant, Clyde Mattox, at the time said order and ruling was made then and there excepted.

THE UNITED STATES
vs. } 900. Indictment for murder.
CLYDE MATTOX.

And now, on this 26th day of January, 1894, and being the day of the January, 1894, term of said court, this cause coming on further to be heard, the United States being present by Hon. W. C. Perry, United States attorney, and the defendant being present in person and by his attorney, Charles R. Redick, and the defendant moves the court for further time in which to present and settle his bill of exception as well also as his petition for the writ of error herein and the court; being fully advised and finding good cause therefor, it is ordered that said motions be, and the same hereby are, sustained, and the defendant is given until the twenty-second day of March, A. D. 1894, inclusive, in which to pre-

pare and have signed and settled his bill of exceptions herein, and until the same day, inclusive, to file his petition for the writ of error agreeable to law.

Dated .

JNO. A. WILLIAMS,
U. S. District Judge.

THE UNITED STATES
vs. } 900. Indictment for murder.
CLYDE MATTOX.

Now, on this 26th day of January, 1894, the defendant, Clyde Mattox, being present in person and by his counsel, J. W. Johnson, Charles
23 R. Redick, and D. C. Lewis, the United States being represented by W. C. Perry, United States attorney for the district of Kansas, said W. C. Perry, United States attorney, moved the court for judgment and sentence upon the verdict of the jury heretofore returned and filed in this cause. Thereupon the court asked the defendant, Clyde Mattox, if he had anything to say why the judgment of the court and sentence of the law should not be pronounced against him at this time. To which interrogatory propounded by the court the defendant, Clyde Mattox, replied that he was not guilty. The court, finding no legal reason in the said response of the said defendant, Clyde Mattox, why the sentence of the law and judgment of the court should not be pronounced upon him the said Clyde Mattox, in conformity with law and the verdict of the jury in this action, did thereupon in open court consider, order, and adjudge, and it is hereby considered, ordered, and adjudged, that the said Clyde Mattox be remanded to the custody of the marshal of the United States for the district of Kansas until Friday, the 23rd day March, 1894, and that on that day, between the hours of ten o'clock a. m. and two o'clock p. m. of said day, he, the said Clyde Mattox, be by said marshal taken to some suitable place in the city of Wichita, in the county of Sedgwick, and State and district of Kansas, and that he, the said Clyde Mattox, then and there be hanged by the neck until he is dead.

25 UNITED STATES, PLAINTIFF,
v. } 900.
CLYDE MATTOX, DEFENDANT.

Copy of bill of exceptions.

In the district court of the United States within and for the district of Kansas, September term, 1894.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
CLYDE MATTOX, DEFENDANT.

Appearances: For the prosecution, Hon. W. C. Perry and Morris Cliggett; for the defense, J. W. Johnson, C. R. Redick, and D. C. Lewis.

Statement of the case to the jury by Mr. Cliggett for the prosecution; whereupon among other witnesses introduced for the prosecution were the following, to wit:

26 U. S. ATTORNEY. I offer the testimony of Thomas Whitman, as taken in this court in the trial in September, 1891.

J. W. JOHNSON. I object for the reason that the preliminary foundation for it has not been shown. It has not been shown that his testimony was taken; that his testimony was reduced to writing, and nobody has been heard to show that the testimony which he offers is the testimony.

H. B. TRACY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by W. C. PERRY:

Q. State your name.
A. H. B. Tracy.
Q. What is your occupation?
A. I am a stenographer.
Q. I will ask you if you reported the testimony taken in this case at the September term, 1891?
A. Yes, sir; I reported it.
Q. I will ask you to state if a witness named Thomas Whitman was sworn on that trial?
A. He was.
Q. In this case?
A. Yes, sir.
Q. On the trial had in this court?
A. Yes, sir.
Q. Was the defendant present during the taking of this testimony?
A. He was present; yes, sir.
Q. In person and by attorneys also?
A. Yes, sir.
Q. Was the witness sworn by the clerk of the court?
A. Yes, sir; he was sworn.
Q. Was he cross-examined by counsel for defendant, the attorney who is now one of the attorneys representing the defendant in this trial?
A. Yes, sir; he was cross-examined by Mr. Johnson.
Q. I will ask you to look at this paper which I now hand you and state to the court whether or not you prepared it and what from.
A. This testimony was prepared by a lady who reported the testimony for the defendant, and I compared it with my notes and made a certificate.
Q. Is that a correct transcript as shown by your stenographic notes taken by you on the trial in September, 1891?
27 A. Yes, sir; that is correct.
Q. Did you compare that transcript with your stenographic notes, and are you now able to state that the transcript of Thomas Whitman's testimony is a correct transcript of that evidence?
A. Yes, sir; I made the comparison, and it is a correct transcript of his evidence.

Cross-examination. Questions by J. W. JOHNSON:

Q. Is that a transcript made from your notes?
A. No, sir.
Q. You were the official stenographer?
A. Yes, sir.
Q. Have you ever made a transcript of the testimony given by him as taken by you?

A. I never did.

Q. You say this is a transcript from the notes of a private stenographer which was made by that stenographer and afterwards compared by you with your notes?

A. Yes, sir.

Q. And that it is substantially correct?

A. I said that it was correct.

U. S. ATTORNEY. I offer this transcript for the purpose of showing that this was the transcript prepared by the defendant or his attorneys when they appealed the case to the Supreme Court of the United States, and I refer particularly to the statement bearing the signature of J. W. Johnson——

J. W. JOHNSON. I object to the introduction of that or its reading before the jury.

COURT. The jury will not regard that; it is not part of the testimony.

Q. (Continued.) — and Wilson and McMecham, attorneys for defendant, and endorsed in the case of United States of America vs. Clyde Mattox. I also call attention to the certificate of John A. Riner, the judge who presided at said trial, and the certificate of H. B. Tracy, official stenographer, stating that he compared all testimony found in the transcript with his notes, and that it is substantially a correct one, and I refer to the whole of that testimony as evidence on that point. I offer to show that this was filed in this court by the defendant or his attorneys as a bill of exceptions, on December 2d, 1891; that an appeal was subse-
28 quently allowed on the application of the defendant by Judge Brewer on this transcript filed by this defendant or his attorneys in the Supreme Court of the United States in their appeal from the decision in the case in this court.

J. W. JOHNSON. All of this which has been offered, saving and excepting the record itself, and the testimony tending to show that it was the testimony of Thomas Whitman, is specially objected to as immaterial and incompetent, and the testimony of Thomas Whitman is objected to, or the record of the testimony is objected to as incompetent under the law for introduction here, and, your honor, my colleagues have some authorities if your honor will hear them.

Mr. REDDICK. Your honor, the objection to the testimony of Whitman is that the record of his testimony, given on a former trial, is hearsay and secondary evidence, and therefore incompetent, it not being shown that the defendant is reponsible for the absence of Whitman, and he desires to stand upon his constitutional right to be confronted by the witnesses in this prosecution.

29 The objection is overruled.

Attorney for defendant excepts.

30 The United States attorney also offered the following evidence:

CHARITY WHITMAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by W. C. PERRY:

Q. Did you live in Oklahoma City in the year 1889?

A. Yes, sir.

Q. What relation were you at that time, if any, to Tom Whitman?

A. I was his wife.
Q. Where is he now?
A. He is dead.
Q. When did he die?
A. He died on the 15th of January.
Q. What year; do you remember?
A. 1893.

31 THOMAS WHITMAN, a witness on behalf of the prosecution, being first duly sworn, testifies as follows:

Direct examination by Mr. ADY:

Q. Is your name Thomas Whitman?
A. Yes, sir.
Q. Where do you live?
A. Oklahoma City.
Q. How long have you lived down there?
32 A. Ever since the same week it opened.
Q. Know Laura Walker?
A. Yes, sir.
Q. How near did you live to her house in December?
A. I lived the next house.
Q. Which way from it?
A. East.
Q. What did your family consist of at that time?
A. I had a daughter.
Q. A wife?
A. Yes, sir.
Q. Do you know Clyde Mattox?
A. Yes, sir.
Q. When did you first get acquainted with Clyde?
A. Ever since I have been in the country.
Q. Do you remember the killing of John Mullin?
A. Yes, sir.
Q. How long had you known Clyde before that time?
A. About three months, I guess.
Q. Where did you first get acquainted with him, do you remember, or find out who he was?
A. I have been acquainted with him ever since I have been there—on the streets.
Q. Did Clyde have any business at that time?
A. No; he didn't. When I first got acquainted with him?
Q. Yes.
A. I don't think he had been; he had been——
Q. Did he have any business at the time Mullin was killed?
A. Yes, sir.
Q. What was it?
33 A. He was deputy, I suppose; he was acting deputy.
Q. Deputy what?
A. Marshal.
Q. Town marshal?
A. Yes, sir.

Q. Deputy marshal of the city of Oklahoma?
A. Yes, sir.
Q. Had you ever been with Clyde?
A. That day I was.
Q. What day?
A. The day he killed John.
Q. Where?
A. Right across the street from where he shot John at.
Q. What were you doing?
A. He had an old man arrested. I wasn't doing anything that day.
Q. Who was the man he had arrested?
A. I don't know the old gentleman; he was a Bohemian.
Q. You don't know his name?
A. No, sir.
Q. How did you happen to be where Clyde was that day?
A. It was not far from my house; about five blocks from me, I guess.
Q. You mean that is where the man was arrested?
A. Yes, sir.
Q. Did you have any talk with Clyde that day?
A. No, sir. He did tell me——

Mr. JOHNSON. I object unless it has reference to this matter.

34 (Objection overruled. Defendant excepts.)

Q. Did you have a talk with him that day?
A. Yes.
Q. Any talk any other day prior?
A. Yes, sir.
Q. In that talk that day did he call you by any name?
A. No, sir; he didn't.
Q. I mean when the old man was arrested.
A. No, sir.
Q. Were you present when John Mullin was shot?
A. Yes, sir.
Q. When was it?
A. It was in December, I think.
Q. What year?
A. I think 89.
Q. How long ago? How many Decembers ago?
A. Well, it was——
Q. First one after you were there?
A. Yes, sir.
Q. Who else was present when John was shot?
A. Well, my wife. She had her hand on this shoulder [indicates] of mine.
Q. Which shoulder?
A. This one [indicates].
Q. The left?
A. Yes, sir.
Q. What is her name?
A. Charity.

Q. Did you see anyone else there?

35 A. No, sir: I didn't.

Q. How long did you know John Mullin, about?

A. I don't know exactly; about three or four months; about four months, I think.

Q. What sort of a man was he physically, healthy?

A. John was a healthy man.

Q. What first attracted your attention there that evening to any trouble there, if anything?

A. At what time?

Q. I say what first attracted your attention to it?

A. At night or that day?

Q. The night of the trouble?

A. Two women's cries in the street.

Q. Did you see the women?

A. No, sir.

Q. Did you know who they were?

A. Yes, sir.

Q. Who were they?

A. Lizzie Well and Laura Hudson.

Q. Were they colored women?

A. Yes, sir.

Q. Did you know where they were on the streets when they hollered?

A. No, sir.

Q. What did you hear that attracted your attention?

A. They screamed, one of them.

Q. How far were they from your house?

A. They were just across the street, the house nearly facing mine.

Q. Where were you when you first heard the screaming?

A. A settin' in my house.

36 Q. Who was in there with you?

A. My wife.

Q. What did you do when you heard this cry?

A. I jumped up and ran out.

Q. When you got to the door, what did you see?

A. I never seen anybody when I got to the door. In a short time Clyde and his partner came across the street and asked John, "What in hell he was hollering at him across the street?" Clyde came across the street and asked John "What in hell he was hollering at him?" John told him he had no right to scare women in the dark, and Clyde told him to shut up, and John told him he wouldn't do it, and Clyde put one foot on the door and stepped up and fired twice, and the other man once.

Q. How much yard was there to that house?

A. About three feet.

Q. Was there a fence in front of the house?

A. Yes, sir.

Q. Where were these men when you first saw them?

A. Not quite to the gate.

Q. What did Clyde have to shoot with?

A. A revolver.

Q. Did you notice how John was standing when he was shot?

A. Yes, sir.

Q. Indicate to the jury how he was standing. Stand up.

A. The house was facing north. John stood this very way. When John was falling the other ball shot him right in there.

Q. Both young boys?

A. Yer, sir.

Q. Did you know who the other man was?

37 A. No, sir; I didn't. I have seen him several times.

Q. How far was you standing from Clyde when you say he shot John Mullin?

A. I was standing pretty close to him; as close as that jury. I stopped outside the door; just that way [indicating]. He put one foot upon the door, like that.

Q. Are you sure that was Clyde?

A. Yes, sir.

Q. Did he speak to any one except Mullin?

A. He spoke to me when he first got in the yard. Said "Hello, Joe," and struck me on the shoulder.

Q. What else did he say?

Mr. JOHNSON. Well, well ——

Q. Anything else?

A. He said "I know you;" I said "yes, I know you, too."

Q. Was that before or after the shooting?

A. Before the shooting.

Q. How near was your wife standing to you at that time?

A. She had her hand on my left shoulder.

Q. Which way from the door?

A. Facing north.

Q. Which way from you?

A. She was standing on the east side from me.

Q. Your wife was?

A. Yes, sir.

Q. You know about what time it was?

A. At night.

Q. Yes.

A. Between eight and nine o'clock; I don't know exactly; I think it was a quarter past nine when I went to jail.

38 Q. When you went to jail? What for?

Mr. JOHNSON. I object to that.

By the COURT. I don't see the materiality.

Q. State whether you went to jail for any offense.

A. Thornton carried me to jail to keep me out of the boys' way.

Q. Thornton?

A. Yes, sir.

Q. I want to know whether you was arrested for any crime?

A. No, sir.

Q. How many shots were fired?

A. Three.

Q. How many did Clyde fire?

A. Two.

Q. Which one fired first?

A. Clyde Mattox; twice.

Q. What did John Mullin do during the shooting?

A. Not a thing. The pistols were fired as fast as they could; John was falling, Clyde shot the last time; John was falling and the other boy shot him right in there [indicates].

Q. Did you see John Mullin afterwards?

A. Not that night; the next morning.

Q. Did you see the wounds on his body?

A. Yes, sir.

Q. Where was he shot?

A. One ball went in the right arm right in there; and one right in here, and the other right in his hip [indicates].

Q. How many times was he shot?

A. Three.

Q. Were you there when he died?

A. No, sir; I was in town.

39 Q. Did you see him after he was dead?

A. Yes; about five minutes.

Q. What time did he die?

A. About fifteen minutes past two o'clock.

Q. Was you any relation to John?

A. No, sir.

Q. What relation was you to Laura?

A. Her daughter is my wife.

Q. Where did you live prior to going to Oklahoma?

A. I staved in Varginny. The year before going to Oklahoma, Fort Smith, Arkansas.

Cross-examination of Thomas Whitman by Mr. JOHNSON:

Q. How long did you say you had known Clyde before Mullin was shot?

A. I know him ever since he came to the country. Ever since his ——

Q. When did you come to ths country first?

A. In June, the year it opened.

Q. How long do you say it was after you went there before you became acquainted with or knew Clyde?

A. It wasn't very long after that, because I got acquainted with him in a short time.

Q. Well, had you met him—how many times had you met Clyde or conversed with him prior to the night on which John was killed—that is, before that night?

A. I never had any talk with him at all before that day.

Q. That day was the first time you ever talked with him?

40 A. Yes, sir.

Q. Tell the jury how many times, according to the best of your judgment, you had seen Clyde before that night at the time you say John was shot.

A. I could not tell, because I saw him nearly every day.

Q. What did you see him doing during these times?

A. Sometimes gambling and sometimes he wasn't.

Q. Sometimes what?

A. Sometimes gambling.

Q. Did you ever see him gamble?

A. Yes, sir.

Q. Are you certain?
A. Yes, sir.
Q. Where?
A. Right across from the depot.
Q. How many times, in your judgment, will you say you saw him gamble?
A. Not but one time.
Q. About when was that time?
A. I don't know what time that was.
Q. Give your best judgment.
A. I could not say what time it was.
Q. About when?
A. It was shortly after—about a month, I guess, before he killed John.
Q. Well, you think you saw him gamble during the month of November?
A. Yes, sir.
Q. What time in the day or night was it you saw him gamble?
A. It was on Saturday. I don't know what time of day.
41 Q. Was it day or night time?
A. Day.
Q. Before or after noon?
A. I could not say, but I think it was before twelve o'clock.
Q. What do you say as to the time of day it was?
A. Before twelve o'clock, I think; I don't know.
Q. Can you tell who else was in that room at that time?
A. No, sir.
Q. Was there anybody else there?
A. Yes, sir.
Q. Other parties you knew?
A. I know Jack.
Q. Anybody besides Jack and Clyde?
A. No, sir.
Q. What game was it?
A. I don't whether he was playing poker or what.
Q. That was about a month, you think, before. Had you ever seen him gambling on any other occasion at that place or any other place?
A. No, sir.
Q. You say you got acquainted with him soon after you came there?
A. Yes, sir.
Q. You came there in June? About what date was it you came there?
A. I don't know.
Q. First part of the month or the last?
A. It was in the middle of June, I suppose; I don't know.
Q. What is your judgment as to whether you learned to know who Clyde was during the month of June?
42 A. No, sir.
Q. When was it you first learned to know him; in July or Aug.?
A. I had been knowing Clyde ever since I had been there; I don't know what month it was in.
Q. How long had you been there before you knew Clyde; as to your judgment how many weeks?

A. I could not say.

Q. Where did you first know him?

A. He was traveling up and down the street like any other gambler.

Q. Is it your judgment it was late in the month of July you first learned to know Clyde?

A. I didn't say.

Q. Saw him traveling up and down the streets during the ——— was there a month's time after you went there that you didn't see Clyde?

A. I don't think there was.

Q. What do you say as to whether you saw him during the month of July?

A. I don't say.

Q. What do you say as to whether you saw him during the month of August?

A. It wasn't very long; I had come back from Wichita; I knew him after I went back home. He was there when I got back there.

Q. Did you ever know Clyde until you came back from Wichita?

A. He was at home in Oklahoma City when I knew him.

Q. When you first knew him? did you know him before he came to Wichita?

43 A. No, sir.

Q. You knew him after he came back from Wichita? Tell the jury you saw this man during the month of July.

A. I don't say.

Q. What is your best recollection as to how long it was after you went there in June until you learned to know Clyde Mattox?

A. I believe it was in July; I wouldn't be positive.

Q. Give your best judgment. Do you know where it was when you first learned to know who he was?

A. It was on the corner of Main St.

Q. Do you know what he was doing?

A. He and old man Hine's son were talking together.

Q. Talking together?

A. Yes, sir.

Q. And that was the first time you knew him?

A. Yes, sir.

Q. You think it was the month of July?

A. I think it was.

Q. How long a time was it after you first knew him up to the time of this shooting that you didn't see him; what was the longest time you didn't see him?

A. It may have been a week or two weeks.

Q. Did you after you first knew Clyde see him every week or two up to the time of the shooting?

A. No; I didn't because I worked at the House; sometimes I didn't see him at all for a week.

Q. I say every week or two?

A. Nearly every week or two.

Q. Traveling up and down the streets?

A. Sometimes he was and sometimes he wasn't.

44 Q. You saw him up to the time and learned to know him well by the time you saw this shooting?

A. Yes, sir.

Q. You never talked with him, however, up to this day, the day before the shooting?

A. No, sir; I didn't.

Q. Well, you had a little conversation with him on this night; at the time of the shooting you saw him—at the time of the shooting?

A. Yes, sir.

Q. Can you tell the jury what kind of a night it was as to being light or dark?

A. It was a starry night.

Q. What about whether it was dark or light? How far could you recognize a man that you knew?

A. The door was standing open, the door was standing open, the table stood about here [indicates], there was a big lamp on the table and on it a globe and you could see outside of the gate by that.

Q. I only asked you as to the character of the night; how far, in your judgment, you could see a man not in the light and recognize him?

A. I don't suppose you could see him very far.

Q. When you heard this noise what were you doing?

A. I was sitting on the side of the bed.

Q. What was your wife doing?

A. She was straightening up the bed.

Q. Either of you undressed in whole or in part?

A. How is that?

45 Q. Either of you undressed?

A. No, sir.

Q. Had you none of your clothing off?

A. One shoe off.

Q. Had your wife any of her clothing off?

A. I don't think she did; no, sir; she didn't.

Q. Remember and say whether at the preliminary examination you didn't state, and your wife also, that she was undressed and went out there in her night clothes?

A. I don't think she did; but I know I wasn't, because I didn't go back in the house any more.

Q. Was there a light in your house?

A. Yes, sir.

Q. Also a light over where John was?

A. Yes, sir.

Q. You heard this noise across the street and went out at once?

A. Yes, sir?

Q. Did you see these parties across the street?

A. I never seen them until they got to the gate.

Q. The gate in front of John's house?

A. Yes, sir.

Q. How far was the gate ——

A. About four feet from the door.

Q. Was there a gate through or an open way?

A. A gate through.

Q. What kind of a fence?

A. A paling fence.

Q. Any fence between the house and your house?
A. There was.
Q. You lived on a twenty-five foot front lot, did you?
46 A. Yes, sir; front.
Q. One of those twenty-five feet front lots?
A. Yes, sir.
Q. Next east of the lot on which John and Mrs. Walker were living?
A. Yes, sir.
Q. When you saw them coming close to the door, where were you?
A. I was got right up side to the door; when I see the boys walking up I slowed up.
Q. What made you go to John's?
A. Didn't I hear them coming across the street?
Q. Is that why you went?
A. Yes, sir.
Q. You heard them walk?
A. Yes, sir.
Q. Was it muddy or dry?
A. Dry.
Q. Frozen?
A. No, sir.
Q. You could not see them, but heard them walking?
A. Yes, sir.
Q. You could tell that they were coming across towards the house?
A. Yes, sir.
Q. You hadn't heard anything said up to that time?
A. Not until they got to the door.
Q. Did these parties who came over there open the gate?
A. Clyde and that other boy, they pushed the gate open and walked in.
Q. When they walked in where were you standing?
47 A. About three feet from the door.
Q. What direction from the door?
A. East.
Q. Where was your wife?
A. Right behind me.
Q. Standing right behind you?
A. Yes, sir.
Q. Now, when these parties came in one walked up and called you Joe?
A. He did. He said, "Hello, Joe; I know you."
Q. What did you say?
A. I said, "Yes, I know you, too."
Q. What was said up to that time, if anything, between these two men and John Mullin; what was said between these two men and John Mullin?
A. The first word Clyde said, "What in hell are you hollering to me out in the street?" John said, "You have no right to scare these women." Clyde said, "Shut up;" and told him to throw up his hands. He said he wouldn't. Clyde shot him twice and the other boy once.
Q. Where was Clyde standing?
A. He hadn't put his foot on the door; when he said that to him he put one foot on the door.
Q. Was there a step in front of the door?

A. One step; yes.

Q. Do you know how high the door was in front; the bottom facing of the door?

A. It wasn't as high as that step (points to step).

Q. So it was; there was a step out in front of the door; what kind of a step was that?

48 A. Just one plank.

Q. How broad was it?

A. About a foot and a half.

Q. Which foot did Clyde put on the doorstep?

A. I could not say as to that; he put one.

Q. You are certain of that; this man you call Clyde put a foot up?

A. Yes, sir.

Q. Did he put his foot in front of the door or on the doorsill?

A. In front of the door.

Q. And commenced shooting?

A. Shot him twice.

Q. Mullin attempted no movement towards him at all?

A. None at all.

Q. You were still standing there?

A. Yes, sir.

Q. You knew Clyde Mattox at that time?

A. Yes, sir.

Q. Clyde knew you?

A. I suppose so; he recognized me.

Q. He had talked to you that day?

A. Yes, sir.

Q. Can you tell how he was dressed?

A. A broad brimmed black hat and a little knitted coat.

Q. Did he have on an overcoat?

A. He had on two coats; a knitted coat the coat he had on that day, and that night he had on a black overcoat.

Q. Was the coat buttoned up?

A. I don't think it was; either one of them.

49 Q. When did you first see his pistol?

A. Not until he told John to throw up his hands.

Q. Could you tell where he got his pistol from?

A. I don't know whether he got it out of his side pocket or out of a belt.

Q. Did you see the pistol when he was pulling it out or in his hand?

A. Not until he pulled it out and was holding it in both hands.

Q. You can not tell where he got it from; from his pocket, or belt, or where, you don't know.

A. No, sir; I would not say.

Q. Where was your child on that night?

A. She was on the bed with the old lady.

Q. What old lady?

A. My mother-in-law.

Q. Mrs. Walker.

A. Yes, sir.

Q. Was John Mullin living with her?

A. Yes, sir.
Q. Were they married?
A. No, sir.
Q. Were you and John good friends?
A. Yes, sir.
Q. How long had you known John Mullin?
A. I hadn't known him more than four months.
Q. Had he been living with the old lady all that time?
A. No, sir.
Q. How long had he been living with the old lady?
A. I could not say.
50 Q. About?
A. I suppose about a couple of months.
Q. You and he were good friends at that time?
A. He didn't never did anything to me, and I never did anything to him.
Q. You were good friends?
A. Yes, sir.
Q. Did you know Frank Wolf?
A. I do.
Q. How far does he live from where you lived at that time?
A. Let me see, six lots between us.
Q. What direction does he live?
A. West.
Q. Did you see him on that night?
A. No, sir; I didn't.
Q. Did you not see him right almost immediately after this shooting?
A. No, sir; because in about ten minutes after the shooting I went to jail.
Q. I ask if you didn't see him within five minutes after the shooting?
A. I did not.
Q. Is it not true he came out almost immediately after the shooting; you came out; he asked you who did that shooting, and you told him you didn't know?
A. I didn't see Wolf that night.
Q. Didn't you say to Wolf that when the shooting occurred you were in your house?
A. I never spoke to him.
51 Q. Did you say that?
A. I did not.
Q. Do you know J. W. Housell, who kept the drug store at the corner of Reno avenue and Broadway?
A. Yes, sir.
Q. Do you also know his son, William Housell, in business with him, a young man?
A. I know the boy; I don't know the old man.
Q. Were you in their drug store that night shortly after the shooting?
A. Yes, sir.
Q. I will ask you whether or not you did not go there inquiring of them where you could find a physician; upon being asked what was the matter, you told them John Mullin was shot; and whether or not they didn't ask you who did the shooting, and you told them you didn't know.

A. I did, because Thornton told me to tell everybody so.

Q. Told you what you told them?

A. Yes, sir.

Q. Do you know Mrs. Josie Geffs? She boards and rooms in the building with Mrs. Hatch, Clyde's mother.

A. Yes, sir.

Q. Did you not in the latter part of the month of August last, on Main st., in Oklahoma City, go to Mrs. Hatch, Clyde's mother, in the presence of Mrs. Hatch and Mrs. Geffs, and there say to Mrs. Hatch that you had received a dispatch from Soper to come to Wichita, and asked her to lend you money to come on; $5.00; and upon her saying to you it was strange that you should ask her for money, that you were going to swear her boy's life away, you said to her: "Mrs. Hatch, I will not do it; it
52 was too dark; I can not say it was Clyde?"

A. I did not.

Q. Do you know one J. E. Love, who lives at Oklahoma City?

A. Yes, sir.

Q. I will ask you whether or not during the month of July or August, in his presence and that of W. C. Wells—do you know Wells?

A. I do.

Q. You didn't say to Mrs. Hatch that you were not certain; that you were mistaken before; that it was too dark, you were frightened, and you could not say it was Clyde, and you never would again?

A. No, sir.

Q. You didn't say that?

A. No, sir.

Q. Did you obtain a physician on that night to go to see John?

A. Yes, sir.

Q. Who was it, Tom?

A. Dr. Graham.

Q. Dr. Graham? You walked down with the dr., didn't you?

A. Yes, sir.

Q. Showed him where it was—where this wounded man was?

A. Yes, sir.

Q. Did you not on the road there talking with Dr. Graham tell him that you didn't know who did the shooting?

A. I didn't tell him any such thing.

Q. Didn't tell him that?

A. No, sir.

Q. Do you know one East, commonly called Doc. or doctor?

A. Yes, sir.

53 Q. T. H. East?

A. Yes, sir.

Q. Had you a conversation with him in Oklahoma City a short while after this occurred?

A. Yes, sir.

Q. Did you not in that conversation tell East you didn't know who did this shooting?

A. I did not.

Q. What had you in your hand that night when you went out there?

A. I had a Winchester.

Q. A Winchester rifle?
A. Yes, sir.
Q. Was it loaded?
A. Yes, sir.
Q. Did you do anything with it?
A. No, sir.
By the COURT. What is the object of this?
Mr. JOHNSON. To show his condition.
Q. How long a time did you remain there by the door near to this building after the shooting before you went away?
A. I went away in about two minutes; I didn't go into the house.
Q. You didn't go to the house?
A. No, sir.
Q. Where did you go when you went away?
A. I went and got Tom, and he told me to get the doctor.
Question asked by a juror. I would like to ask one question: You said something about someone being in jail. Was it you, or do I understand you to say there was someone in jail?
54 A. I said I had been knowing Clyde Mattox ever since he came out of jail.

Redirect examination of Thomas Whitman by Mr. ADY:

Q. Did you say you had any conversation with Frank Wolf about this matter?
A. No, sir; I didn't.
Q. Did you ever have any conversation with him?
A. No, sir.
Q. Did you say you had a conversation with Housell at his drug store after the shooting that night?
A. Yes, sir.
Q. You told him you didn't know who did the shooting?
A. Yes, sir.
Q. Did you say why you told that?
A. Yes.
Q. Why was it?
A. Tom told me to tell everybody until he got Clyde.
Q. Who told you?
A. Thornton.
Q. Who was he?
A. Deputy United States marshal.
Q. Was that why you made that statement to Housell?
A. Yes, sir.
Mr. JOHNSON. I object.
Q. Do you know if that was the reason you were put in jail that night?
A. Yes, sir.
Q. Were you in fear of anybody at that time—at that time you made that statement?
55 Mr. JOHNSON. I object.
By the COURT. It is not material. He stated it was not because of any offence, but Thornton had put him in jail to protect him.
Mr. ADY. I certainly have a right to explain why he made that statement.

By the COURT. The marshal told him for the reason that if Mattox knew it he would kill him.

Mr. ADY. Havn't I the right to show that, to show the condition of the witness?

By the COURT. You have a right to show it if it is necessary.

Mr. ADY. I ought to have the right to show all the motives brought on the witness at that time; we can see how a man might be in fear.

By the COURT. He has given his reasons.

Mr. ADY. You may state, Mr. Whitman, whether or not you were afraid and felt the danger.

Mr. JOHNSON. We object. I don't think it is alleged.

(Objection sustained.)

57 Q. Did you say anything to Dr. Graham the night you went to him who it was who did the killing?

Mr. JOHNSON. I object upon the ground that I asked him specifically whether he said a certain thing, and he said he didn't say it.

By the COURT. The above will be stricken out.

Q. Do you know T. H. East?

A. Doc. East? Yes, sir.

Q. When was it; about how long ago?

A. Three weeks ago; I have been two weeks to-day; it was the day before I came here.

Q. Did you say he didn't do it?

Mr. JOHNSON. He said he didn't.

Q. In the conversation referred to by Mr. Johnson, you may state what that conversation was.

Mr. JOHNSON. I object.

By the COURT. The objection is sustained. I don't think the question is definite enough; I do not myself remember what it was; I will sustain it at this time.

Mr. ADY. It was something to the effect that he didn't know who did the shooting.

Mr. JOHNSON. I asked him if he didn't tell East that he didn't know who it was that did the shooting.

Mr. ADY. I have a right to ask what he said to East because East can come on and say that he said something.

58 Q. Were you ever in jail in Wichita?

A. No, sir.

Q. Anywhere for any offense?

A. No, sir.

That is all.

Recross examination of Mr. Whitman by Mr. JOHNSON:

Q. You say you were never in jail for any offense?

A. No, sir.

Q. Were you not arrested and put in jail——

A. No, sir.

Q. You were not arrested about three weeks ago for whipping your wife?

A. No, sir; I wasn't. You can't get a man in Oklahoma City to say so.

Q. You testified as a witness in the preliminary examination nearly two years ago when Clyde was examined in Oklahoma City before Maj. Monroe?

A. Yes, sir.

Q. I will ask you whether or not I was present?

A. I suppose you was.

Q. I was representing Mattox, wasn't I? I will ask you if at that preliminary I didn't ask you as I did to-day, whether you didn't say to the two Mr. Housells on that night that you didn't know who did the shooting?

A. No, sir.

Q. You didn't say so; you didn't say it? Didn't you answer me in that way?

A. No, sir; I didn't.

59 Q. You remember my asking the question, don't you?

A. I don't remember.

Q. Don't you remember that I, at the preliminary examination, asked you whether you did not say to Dr. Housell and to his son within fifteen minutes after the shooting that you did not know who it was that did the shooting?

By the COURT. That is all gone over.

Q. I will ask you if at that time you didn't deny it and say that you didn't say it at the preliminary examination?

A. No, sir.

Q. You were never in jail in Oklahoma.

By the COURT. You need not answer the question.

60 THOMAS WHITMAN recalled by Mr. Johnson:

Examination by JOHNSON:

61 Q. Tom, on the night that Mullen was killed did you see Thornton before or after you went to Dr. Housell's drug store?

A. Before.

By the COURT. That question was asked yesterday. He may answer the question.

Q. Where did you meet Thornton?

A. On the corner of Broadway and Reno, I believe.

Q. Broadway and Reno?

A. Yes, sir.

Q. Dr. Housell's store was on the corner of Broadway and Reno, wasn't it?

A. I don't think it was on the corner; right in front of—right by Judge real estate office.

Q. Did you go into Dr. Housell's store when you first went to the street?

A. No, sir.

Q. Tom, do you know where Mrs. Hatch lives in Oklahoma City?

A. I do.

Q. I will ask you whether or not you went to Mrs. Hatch's house in the month of June last, on a Saturday night, and asked her for some money——

A. No, sir.

Q. Wait till I finish my question. ——to buy something to eat for Sunday; said to her that you had been working for railroad men and they had not paid you, and you took for her a five-dollar bill and went across the street and bought some coffee and came back, and she let you have a dollar?

A. She did not.

By the COURT. He has answered the question.

62 Mr. JOHNSON. I object.

By the COURT. You will certainly try to deal fairly. I hold the matter was gone into yesterday. I think you asked about that five dollars in at least four different ways. I do not like to have counsel say he does not propose to open up new matter, and then do it. I am certain this matter was gone into yesterday. I watched the testimony as closely as it was possible for a man to do.

Mr. JOHNSON. I think the court is mistaken.

By the COURT. I know I am not mistaken.

Mr. JOHNSON. I think that an examination of the record will show that I did not.

Q. I will ask you whether or not at a time about two weeks after that, on a Sunday evening, you went to Mrs. Hatch at the same place, Tom, and told her you wanted to talk with her, and in that conversation asked her to let you have twenty dollars for your wife to go to Birmingham, Ala., and also said to her in that conversation that you would never swear against Clyde, and that you were going to undo the matter?

By the COURT. You need not answer that question.

By the COURT (to Mr. Johnson). I do not wish to be obliged to call your attention to the fact that you are not permitted to go into that matter. You asked about that yesterday, and you can not help but know yourself that you asked that question.

Mr. JOHNSON. This question is specific.

By the COURT. That was yesterday; it is the same matter, except that you simply changed the form of your words to get at it.

Mr. JOHNSON. My only object is to be specific, so that when I come to the witness I can ask that question.

(Defendant excepts.)

63 Q. Didn't you say there you had come to talk to me about the Mattox case and I said, "I do not want to talk to you about it because I am the attorney on the other side and all that anybody will ask of you is to tell the truth?"

A. You didn't say that.

Q. Who was with you?

A. Bill Rose. He stopped at the gate.

Q. Didn't he go around with you?

A. No, sir; he wasn't standing where you and I was.

Q. Didn't he go round the house?

A. No, sir.

Q. Do you say, Tom, that I ever talked to you about this case?

A. Not since that Sunday.

Q. Did I ever since?

A. No, sir.

Q. Did I talk with you about this case there?

A. Excusing that day you never did.

Q. I ask you whether I talked with you about that case at all at that time?

A. You told me I may be mistaken in the man, didn't you?

Q. No, sir; I didn't.

By the COURT (to Mr. Johnson). You are not on trial.

Mr. JOHNSON. I think I am his attorney.

Q. Did you come to my front gate?

A. Yes, sir.

Q. You come into the yard; did you call me to the gate?

A. I told you I went in the yard through the gate, didn't I?

64 Q. I will ask you if it is not true that you came and opened the gate and walked in around to the back porch and as you passed the front porch said to me, "Mr. Johnson, I want to see you?"

A. No, sir.

Q. Didn't you say to me, "I have been to see Mrs. Hatch, and she sent me to you;" didn't you?

A. Yes, sir.

Q. Didn't I say, "I am attorney for Mattox; you are a witness against him, and all I want you to do is to tell the truth?"

A. You said that, too.

That is all.

Mr. ADY. Said also you may be mistaken?

A. Yes, sir.

Mr. JOHNSON (to Mr. Ady). I say to you that I didn't say it.

Q. Is it a fact that Mrs. Hatch has frequently sent for you to talk about your testimony and hunted you up?

A. Yes, sir; she has. She sent me to Mr. Johnson.

Q. You may state, Tom, whether during this whole time you have been in fear of Clyde Mattox, his mother, or other friends?

A. Yes, sir.

65 U. S. ATTORNEY. I offer the testimony of George Thornton, as taken in this court in the trial in September, 1891.

J. W. JOHNSON. I object, for the reason that the preliminary foundation for it has not been shown. It has not been shown that his testimony was taken, that his testimony was reduced to writing, and nobody has been heard to show that the testimony which he offers is the testimony.

H. B. TRACY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by W. C. PERRY:

Q. State your name.

A. H. B. Tracy.

Q. What is your occupation?

A. I am a stenographer.

Q. I will ask you if you reported the testimony taken in this case at the September term, 1891.

A. Yes, sir; I reported it.

Q. I will ask you to state if a witness named George Thornton was sworn on that trial.

A. He was.
Q. In this case?
A. Yes, sir.
Q. On the trial had in this court?
A. Yes, sir.
Q. Was the defendant present during the taking of this testimony?
A. He was present; yes, sir.
Q. In person and by attorneys also?
A. Yes, sir.
Q. Was the witness sworn by the clerk of the court?
A. Yes, sir; he was sworn.
Q. Was he cross-examined by counsel for defendant, the attorney who is now one of the attorneys representing the defendant in this trial?
A. Yes, sir; he was cross-examined by Mr. Johnson.
Q. I will ask you to look at this paper which I now hand you and state to the court whether or not you prepared it, and what from.
A. This testimony was prepared by a lady who reported the testimony for the defendant, and I compared it with my notes and made a certificate.
Q. Is that a correct transcript as shown by your stenographic notes taken by you on the trial in September, 1891?
66 A. Yes, sir; that is correct.
Q. Did you compare that transcript with your stenographic notes, and are you now able to state that the transcript of George Thornton's testimony is a correct transcript of that evidence?
A. Yes, sir; I made the comparison, and it is a correct transcript of his evidence.

Cross-examination. Questions by J. W. JOHNSON:

Q. Is that a transcript made from your notes?
A. No, sir.
Q. You were the official stenographer?
A. Yes, sir.
Q. Have you ever made a transcript of the testimony given by him as taken by you?
A. I never did.
Q. You say this is a transcript from the notes of a private stenographer, which was made by that stenographer and afterwards compared by you with your notes?
A. Yes, sir.
Q. And that it is substantially correct?
A. I said it was correct.

U. S. ATTORNEY. I offer this transcript for the purpose of showing that this was the transcript prepared by the defendant or his attorneys when they appealed the case to the Supreme Court of the United States, and I refer particularly to the statement bearing the signature of J. W. Johnson.

J. W. JOHNSON. I object to the introduction of that or its reading before the jury.

COURT. The jury will not regard that. It is not part of the testimony.

Q. (Continued.) And Wilson and McMecham, attorneys for defendant, and endorsed in the case of United States of America vs. Clyde Mattox. I also call attention to the certificate of John A. Riner, the judge who

presided at said trial, and to the certificate of H. B. Tracy, official stenographer, stating that he compared all testimony found in the transcript with his notes, and that it is substantially a correct one, and I refer to the whole of that testimony as evidence on that point. I offer to show that this was filed in this court by the defendant, or his attorneys, as a bill of exceptions on December 2d, 1891; that an appeal was subse-
67 quently allowed on the application of the defendant by Judge Brewer on this transcript filed by this defendant, or his attorneys, in the Supreme Court of the United States in their appeal from the decision in the case in this court.

J. W. JOHNSON. All of this which has been offered, saving and excepting the record itself and the testimony tending to show that it was the testimony of George Thornton, is specially objected to as immaterial and incompetent, and the testimony of George Thornton is objected to, or the record of the testimony is objected to, as incompetent under the law for introduction here, and, your honor, my colleagues have some authorities if your honor will hear them.

Mr. REDDICK. Your honor, the objection to the testimony of Whitman is that the record of his testimony given on a former trial is hearsay and secondary evidence, and therefore incompetent, it not being shown that the defendant is responsible for the absence of Thornton, and he desires to stand upon his constitutional right to be confronted by the witnesses in this prosecution.

68 (The objection is overruled. Attorney for defendant excepts.)

69 The United States attorney also offered the following evidence:

ELISHA HOPKINS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Questions by W. C. PERRY:

Q. Your name is Elisha Hopkins?
A. Yes, sir.
Q. Where do you live?
A. Oklahoma City.
Q. Did you know George Thornton in his lifetime?
A. Yes, sir.
A. *Yes, sir.*
Q. Do you know whether he is alive now?
A. No, sir; he is dead.
Q. How do you know he is dead?
A. I seen him after he was dead.
Q. Did you see his dead body?
A. Yes, sir.
Q. Where?
A. In Mr. Read's, the undertakers.

70 GEORGE THORNTON, a witness on behalf of the prosecution, being first duly sworn, testifies as follows:

Direct examination by Mr. ADY:

Q. State your name to the jury, please.
A. George E. Thornton.

Q. Where do you reside?
A. In Oklahoma City.
Q. Since how long have you resided there?
A. Since the spring of 1888 I have been there.
Q. Since what time have you known Clyde Mattox?
A. I became acquainted with him shortly subsequent to the opening, some time about the first of May, 1889.
Q. Did you become well acquainted with him?
A. Fairly well; yes.
Q. What position were you occupying at that time?
A. I was deputy United States marshal under Marshal Jones, of the district of Kansas and the Indian Territory.
Q. From the time you got acquainted with Clyde up to the time of the killing of John Mullin he lived in that community?
A. Yes.
Q. Met him frequently?
A. Yes; every day or so; sometimes oftener.
71 Q. Do you remember the killing of John Mullin?
A. Yes, sir.
Q. Remember the date?
A. It was on the 12th day of December, 1889.
Q. What time in the day?
A. It was about 10:20 p. m.
Q. Where were you at the time the shooting occurred?
A. I was in my office on Broadway, between Main and First.
Q. How far from the place of the shooting?
A. A trifle over half a mile.
Q. What first attracted your attention?
A. Three shots.
Q. About how rapidly did they occur?
A. (Witness claps his hands.)
Q. Upon hearing these shots what did you do?
A. Locked up my writing desk and went towards where they came from.
Q. On your way down there did you meet anyone?
A. Yes; I met Walter Vends and Thomas Whitman.
Q. About where did you meet them?
A. At the corner of Broadway and California avenue.
Q. How far was they from this place of the shooting?
A. Just about a half a mile.
Q. From the place of the shooting?
A. Yes; just about.
Q. What direction were they going?
A. North.
Q. Rapidly?
72 A. I think so. It wasn't pitch dark, but still so dark I couldn't see far. When I first saw them I noticed they were walking fast.
Q. You may state whether or not you gave Tom Whitman any instructions as to telling who did this shooting.
A. I did.
Q. What instructions did you give him?

A. I first asked him to make a statement about the shooting; after he had finished that I told him not to say anything about it to anyone unless he knew them to be a reliable officer.

Q. Did you give anyone any instructions as to putting Tom into jail?

A. Yes, sir.

Q. Did you order him put in jail for any offence?

A. No, sir; just for protection to his life?

Q. Did you then begin to search for anyone?

A. I did.

Q. Who for?

Mr. JOHNSON. I object.

Mr. ADY. I claim it is competent, and it is my purpose to show that this was almost instantly after the shooting. I desire to prove by this witness that he began the most thorough search for the defendant and kept it up for a number of days, for the purpose of showing that the defendant fled, if I can.

By the COURT. If you are going to connect that with the defendant it is all right.

Mr. Mr. ADY. I do expect to connect it thoroughly.

By the COURT. You may ask the question.

Mr. JOHNSON. I submit for him to state that he began the search
73 for any particular person would not illustrate it. It carries force with it. What Thornton's opinion might have been, I think it ought not to be given to the jury.

By the COURT. I think the better way would be to modify your question and show what the officer did.

Q. You may state what search, if any, you made for the defendant immediately after the shooting.

A. For the defendant?

Q. Yes; for the defendant.

A. I went to the north-bound local train; it came in just immediately after I left Vends and Whitman, and searched the passenger coach, then through the freight cars, and then I told the conductor I would like to ride on the train until I reached a point as I might think proper to get off. He told me to go and see the engineer and ask him to stop wherever I asked him to.

Q. It is unimportant to give the conversation.

A. I rode up in the engine until I decided there was no use in going farther; he slackened the train, I jumped off and went around through town and there I met a friend of mine named Tom Wade.

Q. What was he?

A. He was deputy United States marshal at that time from the Sac and Fox Reservation. I told him——

By the COURT. Never mind the conversation.

Q. If you got any one to aid you in the search state the name.

A. I suppose there were twenty-five or more people out that night. I think I notified about fifteen.

Mr. JOHNSON. I submit that this does not prove——

74 A. Some of the merchants and police and one man that was posse under me, and I told them to look for Clyde Mattox and Doc Keeley. I was looking for them myself.

Q. How long did you keep up the search for the defendant?

A. I might say for about two days specially; after that just whenever I thought there was an opportunity of seeing him.

Q. Did you know where he lived at that time?

A. Yes, sir.

Q. Did you go there to search?

A. I did.

Q. Did you more than go; did you stay around there?

A. Yes, sir.

Q. About how long after that did you next see Mattox?

A. I, not being an officer under this court at that time, did not pay special attention, but I think it was about two weeks; might have been longer.

Q. Did you know of his being in town about two weeks after?

A. Near that time.

Q. Who had him in custody, if anyone did?

A. The first time I saw him to know him he was walking up the street; was with his mother, and next I saw him in custody of George Walker.

Q. After that do you know whether he remained in custody or not?

A. I believe he did for a while; then, I think, he escaped.

Q. Do you know how long he was gone after his escape?

A. No, sir.

Q. How long have you been in that country?

A. I went to the Terrirory first in '79.

75 Q. Are you familiar with the lay of the land?

A. Quite familiar.

Q. Do you know the course of the Canadian River?

A. Yes; the general course.

Q. Which direction is this from the Canadian River—north or south?

A. North 173 miles.

Q. Which direction is it from the hundredth meridian—that is, the western boundary of the Territory; which direction is this land where the killing occurred from the hundredth meridian?

A. East.

Q. East in the lands occupied by the civilized tribes?

A. No, sir; in Oklahoma proper.

Q. Did you serve the process from this court?

A. I did, yes; under Marshal Jones.

Q. State whether or not it was in a territory attached to this court.

A. It is or was what is now under the jurisdiction of this court.

Q. There is a branch runs near Oklahoma City?

A. Within one mile.

Q. Can you indicate on a little piece of paper about how it runs?

A. Yes, sir. (Witness takes paper and draws.)

Q. Which one of the lines represents the North Canadian (examining paper)?

A. The north.

Q. That one?

A. Yes, sir.

76 Q. This point represents Oklahoma City?

A. Yes.

Q. What does this point represent?
A. Morgan Wright's place.
Q. What direction is that from Oklahoma City?
A. Nearly due west.
Q. About how many miles?
A. I think it is about a mile and a half.
Q. Now, going west on Choctaw street, the street on which Mrs. Walker's house stood, what direction is Morgan Wright's place?
Mr. JOHNSON. I don't see the *purtenancy* of that.
Q. Going west on Choctaw street, the street on which Mrs. Walker's house stood; what direction from the west end of that street is Morgan Wright's place?
A. Nearly west.
Q. Were you familiar with the condition of that river at that time?
A. Somewhat; it was about three days before I saw it. I believe there was considerable water in it at that time.
Q. There is the Chickasaw Nation down there, is it not?
A. Yes, sir.
Q. What direction is it from Oklahoma City?
A. A little southwest.
Q. Going due south anywhere you strike it? Now, Purcell is down here somewhere, isn't it?
A. Thirty-four miles south.
Q. Is the Chickasaw Nation south of Purcell?
A. Yes; Purcell is in the Chickasaw.
77 Q. South of the South Canadian?
A. Yes, sir.
Q. What would be the direct course to the Chickasaw Nation from Oklahoma City?
A. South or southwest, according to the point you wanted to strike.
Q. Was there a road that run past Morgan Wright's to the Chickasaw Nation?
A. A person could take any of those roads running south or southwest and get there.

Cross-examination of George Thornton by Mr. JOHNSON:

Q. What direction is California street, the street on which you met Tom and Vends, from Reno avenue?
A. Due north.
Q. How far; what distance?
A. One block.
Q. Do you remember what place of business was on the the northeast corner of Broadway and Reno avenue at that time?
A. I believe someone had a real estate office there at that time.
Q. The northeast corner?
A. Yes; that would be directly north of the hardware store.
Q. I mean the northwest corner of Reno and——
A. You said California. You mean Reno?
Q. Northwest corner of Reno and Broadway?
A. Housell's drug store.
Q. And the point at which you met Tom was one block north
78 of that?

A. Yes, sir.

Q. What direction was the point in which the shooting was done from Housell's drug store?

A. Nearly due south; just a trifle east.

Q. You met those parties going north on Broadway?

A. Yes, sir.

Q. Did you or not on that night go to Clyde's home?

A. Yes, sir.

Q. Whom did you see there, if anyone?

A. The light was turned low in the front room; I don't believe I saw anyone inside of the place.

Q. With whom did you speak, if anyone, there at that time at Clyde's home? I want to ask you if you remember now speaking to Mrs. Hatch?

A. I believe I spoke to the lady that night, as near as I can recollect. I will state the conversation when you ask the question.

Q. Do you remember what you did say?

A. Some commonplace remark; didn't amount to anything, just merely anything commonplace to see what I could learn.

Q. You say the first time you saw Clyde after this 'hooting you saw him in company with George Walker?

A. No, sir; I didn't say that.

By the COURT. In company with his mother the first time?

Q. With his mother?

A. I believe so.

Q. How long was it after the time you saw him with his mother you saw him with Walker?

79 A. I think it was the same day.

Q. How long is it your remembrance that was after the killing of Mullin?

A. It seems to me it was a couple of weeks; might have been a little longer.

Q. When did the killing occur?

A. On the night of the 12th of December, 1889.

80 And the defendant, on his part, among other evidence produced by him, offered the record of the testimony of William Housell and John McKee, witnesses who were sworn and testified, in defendant's behalf, at a former trial of this cause; and there being no objection to the introduction of this testimony of the said Housell, and the attorneys for the prosecution consenting thereto, the same was read to the jury, as follows, to wit:

81 WILLIAM HOUSELL, a witness on the behalf of the defense, being first duly sworn, testifies as follows:

Direct examination by Mr. JOHNSON:

Q. Mr. Housell, where did you reside in the month of December, 1889?

A. In Oklahoma City.

Q. Do you remember the occasion or the night on which one John Mullin was killed; do you remember the fact?

A. Yes, sir.

Q. Do you know one Thomas Whitman, who has testified in this case?

A. A colored man?

Q. Yes.
A. Yes, sir.
Q. Did you know him at that time?
A. Yes, sir.
Q. What business were you engaged in at Oklahoma City at that time?
A. In the drug business.
Q. With whom?
A. With my father.
Q. What is his name?
A. J. M. Housell. At the corner of Broadway and Reno.
Q. Where is Reno avenue situated with reference to your store?
A. One street south.
82 Q. Did you or not, on the night of the killing, see Thomas Whitman?
A. Yes, sir.
Q. Where?
A. In the drug store.
Q. I will ask you, Mr. Housell, whether you heard the shots that were supposed to have been the ones that killed Mullin.
A. I heard some shots.
Q. I will ask you whether or not Thomas Whitman came into your store on that night, inquiring for a physician?
A. He did.
Q. And stated to you that John Mullin had been shot?
Mr. ADY. I object to that as immaterial.
(Objection overruled.)
Mr. ADY. The object, I know, is to make it appear that Thomas Whitman admitted the statement that he——
Mr. JOHNSON. We deny the truth of that.
Mr. ADY. Deny the truth of the admission, but admit that he made the statement to Housell.
By the COURT. Strike out the question.
(Defendant excepts.)
Q. Were you present at the preliminary examination of Clyde Mattox in Oklahoma City?
A. Yes, sir.
Q. Did you there hear Thomas Whitman testify?
A. Yes, sir.
Q. I will ask you whether or not on that occasion I propounded to him this question: "Did you or not, on the night of the shooting of
83 John Mullin and very shortly thereafter, in the drug store of Mr. Housell, at the corner of Reno and Broadway avenue, state in his presence and that of his son, Mr. Housell, that 'I don't know who shot John Mullin,'" and then and there denied it, and said that he made no such statement?
Mr. ADY. I object, as incompetent, immaterial, irrelevant, and hearsay.
By the COURT. Now, the question is whether or not upon the preliminary examination he denied the statement to Housell. You may answer the question.
A. Yes, sir.
That is all.

Mr. JOHNSON. Wait a moment. Did you see Clyde Mattox—did you know Clyde Mattox at that time?

A. I knew him, yes.

Q. Did you see him on that night?

A. I could not positively say in regard to that.

Q. I will ask you, Mr. Housell, whether or not you specifically remember hearing those shots in South Oklahoma, of which you spoke?

A. Yes, sir.

Q. I will ask you whether or not it is true that Clyde Mattox, at that time, or within a period of three minutes prior to that time, was in your store and there obtained cigars?

Mr. ADY. I object as leading and forcible upon the witness. It states the whole business.

By the COURT. He may answer the question; the objection is overruled.

Q. The question is whether or not he didn't buy a quarter's worth of cigars?

84 A. He might have; I couldn't say positive.

Q. I will ask according to your best recollection as to whether he was there at that time?

A. I know that he bought cigars there frequently, but as to that night positively I couldn't say.

Q. I ask you according to your best remembrance?

By the COURT: If you remember, state it.

A. I have answered the best I know how.

That is all.

85 Whereupon defendant offered to read to the jury the testimony of the witness, John McKee, who had testified on a former trial of this case, to the reading of which to the jury the attorneys for the prosecution then and there objected; which objection being overruled by the court, and the attorneys for the prosecution there agreeing that the transcript of the testimony of the said John McKee as presented and offered by the defendant was correct, the same was read to the jury as follows, to wit:

86 JOHN MCKEE, a witness for the defense, being first duly sworn, testifies as follows:

Direct examination by Mr. JOHNSON:

Q. Where do you reside, Mr. McKee?

A. In Oklahoma City.

Q. Where did you reside in the month of December, 1889?

A. In Oklahoma City.

Q. Do you remember the circumstance of a colored man by the name of John Mullin being killed there some time in the month of December?

A. I recollect there was a man killed there by that name. They told me.

Q. Do you remember the night when it occurred; do you remember the fact?

A. I remember the night they said he was killed.

Q. State whether or not you heard any shots on that night.

A. Yes; I did.

Q. How many?
A. I think it was three.
Q. At about what time did you hear them?
A. About near ten o'clock.
Q. Where were you, Mr. McKee, when these shots were fired?
A. At the corner of Reno and Broadway.
Q. Near what business house or place?
A. In front or close to the *durg* store.
Q. Whose drugstore?
A. I think Housell is the man that keeps it.
87 Q. Where did you reside at that time?
A. On California avenue.
Q. How far from this point.
A. My house where I lived was No. 8; that is four doors from the corner of Santa Fe st. Santa Fe is east from Broadway; the first from the railroad.
Q. In going to your home from this corner where Housell's drug store was, how would you go?
A. I went in from the back way, across lots. The drug store is on the northwest corner of Reno and Broadway. I had a back cut; I went in across in the back cut into my house.
Q. Was your house or not diagonally lengthwise across the block directly east of the one in which Housell's drug store was?
A. Yes, sir.
Q. Where were those shots you heard?
A. I took them to be out towards the direction of the ice factory, south.
Q. Is that East Oklahoma?
A. Yes; South Oklahoma.
Q. Who was present with you when you heard those shots, if anybody?
A. There was no one present; me and a man by the name of Williams went over to a place on the south side of Reno avenue. He was living in Guthrie. I went over to Housell's drug store to get some quinine. Going in I met Dr. East and Mr. Mattox.
Q. What Mattox?
A. That man there. (Points to the defendant.)
Q. How long was it after you saw East and Mattox until you heard these shots?
88 A. I don't think it was over five minutes.
Q. What had you done in the meantime?
A. I went to the drug store; Mattox said "good evening" and took a cigar. Dr. East said to me, take one. Mattox said, "I am going away." We was standing close to the platform. I goes in and gets my quinine; as I came out of the drug store and stepped about ten feet off to get to Broadway to go home Dr. East made the remark and said, "There is some shooting going on south of town."
ADY. Never mind the conversation.
Q. How far had you gone from these two men, East and Mattox, when you heard these shots?
A. I don't think it was over ten or fifteen feet.
Q. Do you know where they were at the time you heard them?

A. They were standing near the corner of Reno and Broadway, close to the drug store; I passed them as I came out.

Q. Anyone else with them at that time?

A. I don't recollect exactly whether there was or not; I cannot say there was.

Q. How were those shots fired?

A. I heard one shot and two in quick succession. I think it was, if I remember right, there were three shots.

Cross-examination of John McKee by Mr. ADY:

Q. How long have you lived in the Territory?

A. As long as anybody; I am not a sooner.

Q. Will you answer the question?

A. Since the 22nd of April.

89 Q. Were you down there a good deal before that?

A. No, sir.

Q. You plead guilty to some offense here at the last term of court under the title of "Rattlesnake Jack," wasn't it?

A. They had me arrested for selling whiskey; they said if I would plead guilty they would acquit me; and I did.

Q. That is part of your name, isn't it?

A. No, sir; it is not. They called me that.

Q. You went by that name, didn't you?

A. No, sir.

Mr. JOHNSON. Why did they call you that?

By the COURT. No.

(Defendant excepts.)

90 Whereupon, after the reading of the testimony of the said Mc-
91 Kee, and thereupon, S. L. JAMES, a witness called upon behalf of the defendant, being first duly sworn, testified as follows:

Questions by D. C. LEWIS:

Q. Where do you live?

A. Oklahoma City.

Q. Were you acquainted with Tom Whitman in his lifetime?

A. Yes, sir.

Q. I will ask you if in Oklahoma City, on November 29th, 1892, Tom Whitman told you that he didn't see Clyde Mattox on the night that he did the shooting, because it was too dark; that he could not tell who did the shooting, and that on the next day, the 30th, he told you that all he had testified to on the former trial was false, and that he wanted to leave the country; and further, that on the same day, on the 30th, he told you that if you would go and see the friends of Clyde and get him fifty dollars he would give you twenty-five and take the twenty-five and leave the country, as he didn't want to appear against Mattox, and you then asked him why, and he said his reason was because what he had sworn to was not true?

(U. S. attorney objects on the ground that the witness, Tom Whitman, was here at the former trial as a witness; that he was cross-examined; that the question could not be propounded to him for the purpose of impeachment, and that we have no way in the world to contradict the statement.)

COURT. The rules of law are to govern the courts in the administration of justice. That they may possibly at times work a hardship it is true, but they very rarely do, and were this a choice of hardships between the living and the dead, the court would strain the point in favor of the living, letting the past dead bury its dead; but you have not exactly hit upon the objection. There are certain methods laid down for impeaching a witness. This is an attempt to impeach the testimony given by Thomas Whitman. Now, what are the methods laid down in the books which treat upon evidence? One is that you may show by witnesses that he has made statements different from his testimony outside of the court room, and you may ask him the question did he say so and so. The other way is that
92 you may impeach his testimony by showing the utter improbability or the impossibility of its being true. The other method is by calling in his neighbors, those who know his general reputation for truth and veracity, and let them state whether he is entitled to credit or not. But it is a case of first impressions; that the witness, having testified a year ago, his testimony being subject to a rigid cross-examination, and living in the light of this case, living under the observation of the attorneys in this case, living in the immediate vicinity of where this offense is charged to have been committed; that after the lapse of a year and he is dead, and his testimony is read here; that it is permitted now for a witness to come in and detail a conversation between him and a person who is now dead; that he asserted that his testimony, given under the sanction of an oath, under the solemnity of the occasion was not true. It does not come within either rule. It is a case of first impressions. There are no authorities, certainly, that would sustain a question of this kind. I do not see anything to change my mind, but really to strengthen the opinion that I entertained at the last trial of the case, and that is to refuse to admit any testimony of this kind.

(Attorney for defendant excepts to ruling of court.)

93 O. H. VIOLET, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Questions by D. C. LEWIS.

Q. Where do you live?

A. Oklahoma City.

Q. Were you acquainted with Tom Whitman in his lifetime?

A. Yes, sir.

Q. I will ask you if in Oklahoma City, Oklahoma Territory, on the 21st day of January, 1891, at Oklahoma City, the witness, Tom Whitman, made declaration relating to the testimony which he had previously given in the case against Mattox, in which declaration he said emphatically and specifically that his testimony therein was given under threats made to him in the corridors of the court-house in Wichita, he declaring that just previous to his being called to the witness stand he was approached by Captain Stiles, that Captain Stiles shook his finger in his, witnesses' face, and told him that if he dared to utter one word on the witness stand in favor of the defendant, Mattox, he, Stiles, would see that he was sent over the road. He further declared that if it had not been for said threats of Stiles and others that his testimony would not have been given as it was?

(U. S. Attorney objects on the ground that the witness, Tom Whitman, was here at the former trial as a witness, that he was cross-examined, that the question could not be propounded to him for the purpose of impeachment, and that we have no way in the world to contradict the statement.

Objection sustained.

Attorney for defendant excepts.)

94 And the Government and defense having rested, the case was argued to the jury; Mr. Cligget for the prosecution, Messrs Lewis, Redick, and Johnson for the defense, and Mr. Perry for the prosecution.

Case closed.

The foregoing is part only of the evidence offered and introduced on the trial. Many other witnesses were sworn, the defendant himself among the number.

Whereupon, after the case had been argued by the counsel, the defendant, by his counsel, moved the court to instruct the jury in writing as follows, to wit:

95 *Instructions asked to be given by defendant.*

1. Gentlemen, Clyde Mattox is charged with the crime of murder—he is charged with having killed one John Mullen, in Oklahoma Territory, on or about December 12th, 1889. Of this crime the defendant is presumed to be innocent until the contrary is made to appear beyond a reasonable doubt.

2. The crime of murder is committed when a person of sound memory and discretion unlawfully kills any reasonable creature, in being, under the peace of the State, with malice aforethought, either express or implied.

3. The court instructs the jury that malice, within the meaning of the law, includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive.

4. Express malice is the deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

96 5. You are instructed that in law the accused is always presumed to be innocent until his guilt is established by evidence; and to authorize a conviction, such guilt must be established beyond a reasonable doubt—a mere preponderance of evidence is not sufficient.

6. You are instructed that it would be highly improper and wrong for you to regard any statements of the prosecuting attorney that are not based on the evidence in the case, if any such have been made or shall be made.

7. You are further instructed that the indictment in this case is of itself a mere accusation or charge against this defendant and is not of itself any evidence of the defendant's guilt; and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of the indictment in this case.

8. The court instructs the jury that upon the trial of a criminal cause, if a reasonable doubt of any facts necessary to convict the accused is raised in the minds of the jury by the evidence itself, or by the ingenuity of counsel upon any hypothesis reasonable consistent with the evidence, that doubt is decisive of the prisoner's acquit'al.

97 9. The court instructs the jury that in this case the law raises no presumption against the prisoner, but every presumption of law is in favor of his innocence, and in order to convict him of the crime alleged in the indictment, or of any lesser crime included in it, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt; and if the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the crime it is your duty to give the prisoner the benefit of such doubt and acquit him.

10. The policy of our law deems it better that many guilty persons should escape rather than one innocent person should be convicted and punished; to that, unless you can say, after a careful consideration of all the evidence in the case, that every material allegation of the indictment is proved beyond a reasonable doubt, you should find the defendant not guilty.

11. The court instructs the jury that the admissions of a prisoner out of court are a doubtful species of evidence and should be acted upon by the jury with great caution, and, unless such admissions are supported by some other evidence tending to show the prisoner committed the crime, they are rarely sufficient to warrant a conviction.

98 12. The court instructs the jury that in criminal cases, even where the evidence is so strong that it demonstrates the probability of the guilt of the party accused, still, if it fails to establish, beyond a reasonable doubt, the guilt of the defendant in manner and form as charged in the indictment, then it is the duty of the jury to acquit the defendant.

13. You are instructed that when the evidence fails to show any motive to commit the crime charged on the part of the accused, this is a circumstance in favor of his innocence. And, in this case, if you find, upon careful examination of all the evidence, that it fails to show any motive on the part of the accused to commit the crime charged against him, then this is a circumstance that you ought to consider in connection with all the other evidence in the case in making up your verdict.

You are instructed that in order to fairly determine whether the defendant is proven guilty of the crime in manner and form as charged in the indictment, beyond any reasonable doubt, as the law requires, you should take into consideration all of the evidence elicited from the defendant's witnesses, as well as that detailed for the prosecution; and if, after a full and dispassionate consideration of all the evidence in the case, you still entertain any reasonable doubt as to whether the defendant commited the crime in manner and form as charged in the indictment, then you should acquit him.

99 14. You are instructed that the presumption of innocence is not a mere form, to be disregarded by you at pleasure, but it is an essential, substantial part of the law, and binding on the jury in this case; and it is your duty to give the defendant in this case the full benefit of this presumption and to acquit him unless by the evidence in this case you are convinced of his guilt beyond a reasonable doubt.

15. You are instructed that under the laws of the United States the defendant in this case can not be found guilty of murder unless you are satisfied from the evidence, beyond a reasonable doubt, not only that the defendant is guilty of feloniously killing the deceased, but it must further

appear, from the evidence, beyond a reasonable doubt, that such killing was done wilfully and with prior deliberation. And unless these appear from the evidence beyond a reasonable doubt, you can not lawfully find the defendant guilty of murder as charged in the indictment.

16. You are instructed that it is the duty of each and every one of you before you can unite in a verdict of guilty against the defendant to come to the conclusion for yourselves, individually, that the defendant is guilty beyond a reasonable doubt and that if any one of you individually are not convinced from the evidence, and the law as given by the court,
100 that the defendant is guilty beyond a reasonable doubt it would be the duty of such juror to refuse to unite in a verdict the defendant.

CHAS. R. REDICK &
D. C. LEWIS,
Of Counsel.

The within sixteen instructions overruled and refused for the reason that in my judgment the substance of them is embraced in the oral charge given to the jury by the court, and such as is not embraced in the charge of the court I decline to give as not being the law or applicable to the case, to which ruling of the court defendant excepts.

JNO. A. WILLIAMS,
Judge.

A true copy. Attest:

GEO. S. SHARRITT, [SEAL.]
Clerk.

101 Which said instructions asked by the defendant, and each of them, numbered from 1 to 16 inclusive, were by the court, refused, to which refusal to the giving of said instructions and to each of them, the defendant then and there, by his counsel, excepted, and still excepts, whereupon the court instructed the jury orally as follows, to wit:

102 Gentlemen of the jury, the defendant in this case is charged by an indictment preferred by a grand jury with the crime of murder. Under this indictment he may be found guilty of either murder or manslaughter, if the testimony should warrant it. So it will become necessary for me to define murder and manslaughter. Murder is the unlawful killing of a human being with aforethought, either express or implied. The law contemplates that there are two ways of expressing malice—malice express or malice implied. Express malice is the deliberate intention of the mind to take away the life of a human being, which is manifested by external circumstances capable of proof, such as having made threats to take away the life of a person, or having made preparation beforehand to take away the life of a person, such as lying in wait. These are all indications that go to show express malice; but this is not the only way of defining malice or of showing malice. Malice shall be implied where no provocation appears to commit the deed or where all the circumstances of the killing manifest an abandoned and wicked disposition, then malice shall be implied. Thus is by law defined the crime of murder; it must be by malice aforethought either express or implied. The malice must exist at the time of the killing, but it need not have

existed for any considerable length of time, so that if it does exist prior to the killing it is immaterial as to the length of time, but it must have been either with malice express or implied. I told you that under this indictment, if the proof warrants it, he may be found guilty of either murder or manslaughter, so I will define manslaughter to you. Manslaughter, unlike murder, is the unlawful killing of a human being without malice, either express or implied, and without deliberation. Manslaughter must be voluntary, upon a sudden heat of passion, and that passion must be caused by some provocation apparently sufficient to make the passion irresistible. So you will not let the crime, if this defendant is guilty of taking the life of the deceased, John Mullin, you will not let it be reduced from murder to manslaughter unless it comes within the definition of manslaughter. That is, it must be without malice and upon a sudden heat of passion. That is not all. The passion must be caused by some
103 provocation apparently sufficient to make the passion irresistible. In other words, a man is not allowed to get into a passion from some trivial cause or from some trivial insult or injury, but it must be from an impulse that seems to sweep away his powers and make the passion irresistible, and it must be a sufficient provocation in your judgment, not in his, to make it irresistible. When these circumstances combine, gentlemen of the jury, the law, taking into consideration the frailties of the human heart and the human mind and the human being, mercifully steps in and reduces the crime from murder to manslaughter.

Under our law, under all our adjudications, under every phase of the law, every man is supposed and presumed to be innocent until the contrary is shown by competent testimony. This, too, notwithstanding that an indictment may be preferred against a man; and the defendant in this case is presumed to be innocent until the Government has established the fact of his guilt beyond a reasonable doubt. The only office of the indictment is to bring the defendant to trial. It does not diminish a particle the amount of proof necessary to establish his guilt. It has nothing to do with the proof or with the testimony in the case. This presumption of innocence goes with the defendant all through the trial. He is not compelled to offer any testimony, nor is he expected to, in his own behalf, until the Government has established the charge against him beyond a reasonable doubt by competent testimony. Now, as to the testimony, gentlemen of the jury, you are the sole judges of the testimony, and I do not desire to invade your rights or enter into any discussion of what the testimony has been in this case. I leave that to your consideration, subject, however, to these rules, that you are to judge of the testimony in accordance with the rule that I laid down to you. In the first place, you are not permitted to disregard the testimony of any witness who testifies to any facts within his knowledge, unless you see some good reason in your own mind for disregarding his testimony. You are not at liberty to arbitrarily disregard the testimony of a witness, but there must be, before you can do that, some apparent reason to disregard it. If there be, then you are at liberty to disregard it, not otherwise. You are to judge of the credibility of the witnesses and of the weight to be given to the testimony of any witness or of all the witnesses who have testified in this case. You may judge of their credibility in the first
104 place, by any interest they have or may have in the result of your verdict, in the result of this trial in this case. If they have what

appears to you to be an overshadowing interest, you must weigh their testmony in the light of that interest, what effect it would have upon their testimony, what color it would give to it, what bias it would lend to it, or prejudice. You are to judge of their testimony by the apparent probability of their statements being true from all the other testimony and from all the other circumstances of the case; also, from the knowledge they seem to have of the facts that they related in their testimony, of the things that they spoke about in their testimony. You are to judge of it by their conduct upon the stand. You are to judge of it by the apparent interest they may have in the result of your verdict.

There are two ways that have been resorted to in this case of disproving the testimony of witnesses. Either are allowed by law. Both are allowed. One is by showing that witnesses have made different statements about the matter that they have testified to than that testified to under oath by them here. If that fact has been established that any witness or witnesses have made different statements differing from those they made in the trial of the case, you are to weigh their testimony in the light of that contradiction. It is a manner of contradicting a witness. And if you are satisfied that that has been successfully done and that the witnesses who have testified to these contradictory statements have not spoken the truth, you are at liberty to disregard their testimony, but you are not compelled to disregard it. Notwithstanding the contradictory statements that have been made at different times, if they have made them, yet, if you believe that they have told the truth in this trial, you still may receive their testimony with full force and effect. Another method of impeaching a witness is by bringing their neighbors, people who know their general reputation for truth and veracity, and if they say that they know their general reputation for truth and veracity and it is bad, if you believe these witnesses, then you should weigh their testimony with a good deal of care. In fact, you are at liberty to disregard it altogether. But
105 the same rule applies there again as it did about making the contradictory statements. Notwithstanding the fact that witnesses may have been impeached by their neighbors coming and testifying that their reputation for truth and veracity is bad, yet, if you believe that they have told the truth here under oath, you are at liberty to receive their testimony and give it all the credit you see fit.

You are to judge also of the credibility of witnesses by the circumstances that surround the entire case. If witnesses have testified to some things and have left other things which are material that seems from the testimony apparent to your minds that they did know about, and have failed to testify to them, that is a circumstance by which you may weigh their testimony. If there are things within the knowledge of any of the witnesses, whether it be the defendant himself, that might explain his whereabouts, or any circumstances in this case, and there is a failure to do that, this is a circumstance by which you may weigh the testimony of any witness, or circumstance that should be considered by you in making up your verdict in this case. Much has been said upon the question of the defendant leaving that portion of the country, escaping and going away. I say to you, gentlemen, that if the proof shows to you that he did leave, that is a circumstance for you to consider in weighing the testimony as to

his guilt or innocence. It is a circumstance for your consideration. That is all it is. It is not positive as to his guilt, but it is a circumstance for your consideration in weighing the testimony and in weighing the fact of his guilt or innocence. And if it had been in his power, if it was in his power, to explain everything about it and he has failed to do so, this is a circumstance, and this goes to all the witnesses for the Government as well as the defense.

Gentlemen, the defendant, I have said to you, is clothed with the presumption of innocence all the way through this trial, and I say to you now that he is entitled to the benefit of all reasonable doubts that may arise in your minds upon the testimony in the whole case, even to the extent that if, after weighing all the evidence, you still entertain a reasonable doubt of his guilt, it is your duty to acquit. On the other hand, if, after hear-
106 ing all the evidence in the case, you have an abiding conviction of his guilt, an abiding conviction that he is guilty, it is your duty to convict. Now, about the reasonable doubt. A reasonable doubt, in order for the defendant to have the benefit of it, must arise upon the testimony in the case and from nothing outside. And it is not to be a suppositi'us doubt, but it must be a doubt arising upon the testimony, and it must be a reasonable doubt, not something imaginary, not something based outside of the testimony, but based upon the testimony and reasonable to you as reasonable men and jurymen; and it must be such a doubt as would prevent you from acting upon the most important affairs of your lives. If you entertain a doubt of this kind, then the defendant is entitled to the benefit of it to the extent of an acquittal; but, as I said before, if you have still an abiding conviction after hearing all the testimony, in the light of the testimony given you, then it is your duty to convict.

Gentlemen, much has been said, both by the Government and the defense, in regard to matters that I consider away outside of this case, and that is the matter of sentiment. The sentiments are influences that actuate the human mind and the human heart, and sentiments of mercy and anything of that kind are creditable and do honor to all human beings, but you are here as sworn jurors to decide this cause in accordance with the evidence as given by the witnesses in this case and the law as given by the court. Outside of this you have nothing to do. Your verdict must answer to the testimony and answer to the law given you by the court, and answers to nothing else. If you find the defendant guilty, you will simply say: "We, the jury, find the defendant guilty of murder as charged in the indictment." If you find him guilty of manslaughter, you will say: "We, the jury, find the defendant guilty of manslaughter, as charged in the indictment." If you find the defendant not guilty, you will say: "We, the jury, find the defendant not guilty as charged in the indictment."

107 Which said instructions so given by the court were endorsed, United States vs. Clyde Mattox. Instructions. Filed Jany. , 1894. Geo. S. Sharritt, clerk. By J. F. Sherman, D. C.

To which instructions and the whole of them, and to each instruction separately, the defendant, by his counsel, then and there excepted and still excepts.

Afterwards the jury in said cause returned a verdict, finding the defendant guilty as charged in the indictment, which verdict is in words and figures as follows, to wit:

In the district court of the United States, district of Kansas.

UNITED STATES, PLAINTIFF,
v.
CLYDE MATTOX, DEFENDANT. } 900.

We, the jury in the above-entitled cause, duly empanelled and sworn, upon our oaths, find the defendant, Clyde Mattox, guilty, as charged in the indictment.

L. G. MACAULEY, *Foreman.*

(Endorsed:) No. 900. U. S. vs. Clyde Mattox. Verdict. Filed Jany. 16th, 1894. George F. Sharritt, clerk, by J. F. Sherman, D. C.

108 And afterwards, at said January term, 1894, the defendant filed his motion for a new trial, in words and figures as follows:

In the district court of the United States in and for the district of Kansas.

UNITED STATES OF AMERICA,
v.
CLYDE MATTOX. } Indictment for murder.

Comes now the above-named defendant, and moves the court to set aside the verdict heretofore rendered in said cause, and grant a new trial, and assigns the following reasons therefor, to wit:

1st. Said verdict is against the weight of the evidence.

2nd. Said verdict is not sustained by sufficient evidence.

3rd. Said verdict is against the law.

4th. Said verdict is against the law and the evidence.

5th. The court erred in the admission of testimony over the objection of the defendant.

6th. The court erred in refusing to admit testimony offered by the defendant in this, to wit: In refusing to admit the testimony of O. H. Violet and S. L. James of declarations made to them by the Government witness Thomas Whitman to the effect that his testimony given in this case was false.

7th. The court erred in admitting and permitting to be read to the jury the testimony of Thomas Whitman against and over defendant's objection.

109 8th. The court erred in admitting and permitting to be read to the jury the testimony of George Thornton against and over defendant's objection.

9th. The court erred in refusing to give the instructions numbered from 1 to 16 inclusive asked for by the defendant.

10th. The court erred in refusing to give each of the instructions asked for by the defendant.

11th. The court erred in overruling defendant's demurrer to the indictment herein.

12. The court has no jurisdiction to try and determine said cause or to receive the verdict herein or render judgment thereon.

(Signed) J. W. JOHNSON,
CHARLES R. REDICK and
D. C. LEWIS.

(Endorsed:) No. 900. U. S. of America v. Clyde Mattox. Indictment for murder. Motion for a new trial filed January 16th, 1894. Geo. F. Sharrit, clerk.

110 And afterwards said defendant filed his motion in arrest of judgment in words and figures as follows:

111 In the United States district court within and for the district of Kansas.

THE UNITED STATES, PLAINTIFF,
v.
CLYDE MATTOX, DEFENDANT. } Motion in arrest of judgment.

Comes now the defendant, Clyde Mattox, and moves the court to stay and arrest judgment herein, and for ground of this motion says:

First. That this court had no jurisdiction to try this defendant for the offense in the indictment herein charged, but should have, by order, remitted said indictment and action to the circuit court of said district of Kansas.

Second. That all of the proceedings herein since the return of said indictment are void.

Third. That the court had no jurisdiction to inquire into the commission of the offense charged, or to receive the indictment herein, or to cause the apprehension of this defendant therein, for the reason that said offense does not appear to have been committed within said district of Kansas.

Fourth. That the court has now authority or jurisdiction to pass sentence or judgment on this defendant herein.

CHARLES R. REDICK,
112 J. W. JOHNSON,
D. C. LEWIS,
Attorneys for defendant.

(Endorsed:) United States district court, district of Kansas. The United States versus Clyde Mattox. Motion in arrest of judgment.

Filed Jany. 26, 1894; Geo. F. Sharitt, clk. Charles R. Redick, J. W. Johnson, and D. C. Lewis, atty. for deft.

A true copy. Attest: GEO. F. SHARITT, *Clerk.* [SEAL.]

113 And said motion for a new trial and in arrest of judgment were respectively overruled, to which ruling & decision said defendant duly excepted, and to the order made by said court overruling said motions and exceptions thereto were duly entered of record on the journals of said court.

And inasmuch as said several matters so produced and given in evidence on part of the plaintiff, the United States of America, and as the question as to the competency of said witnesses and each of them to testify, and the competency and relevancy of said record testimony, and to the exclusion of testimony offered on the part of the defendant, and as the said instructions so given by said court to the jury at said trial, and the objections and exceptions thereto made by said Clyde Mattox, defendant, by his said counsel, and as the instructions offered and asked for by said defendant by his counsel and refused by the court, and the defendant's exceptions thereto, do not appear of record in said cause, said counsel for said defendant do now present this bill of exceptions to the judge of said court before whom said cause was tried, and within the time allowed by the court for the purpose, and request that the same may be signed and allowed and made a part of the record herein, all of which is done as prayed for, this 8th day of March, 1894.

JNO. A. WILLIAMS, [SEAL.]
U. S. District Judge.

115 In the district court of the United States of America for the district *court* of Kansas.

THE UNITED STATES OF AMERICA, plaintiff, *v.* CLYDE MATTOX, DEFENDANT. } Indictment for murder.

To the honorable the Justices of the Supreme Court of the United States:

Your petitioner, Clyde Mattox, most respectfully represents that in a certain criminal cause, tried and determined in the district court of the United States for the State of Kansas holden in the city of Wichita, Kansas, at the January term, 1894, and your petitioner was defendant, your petitioner, Clyde Mattox, was by verdict of a jury and the judgment of said district court convicted of murder alleged to have been committed within that part of the Indian Territory lying north of the Canadian River and east of Texas and one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, on the 12th day of Dec., 1889, as charged in the indictment found and preferred against your petitioner; and petitioner was by the judgment of said court sentenced to suffer death for said supposed offense, and your petitioner is still under such sentence.

116 And your petitioner further represents that there are manifest errors in the record and proceedings, which errors are specifically assigned and numbered and hereto *numbered and hereto* appended.

And your petitioner desires that said errors may be examined and corrected by your honors, and that your honors may adjudge what of right and according to the laws and customs of the United States should be done therein in the premises.

Wherefore your petitioner prays that your honors may award and issue a writ of error from your honorable court directed to the honorable judge of said district court of the United States for the district of Kansas, commanding him to send your honorable court the record and proceedings

aforesaid, with all things concerning the same, together with said writs, and that your honorable court may examine and correct the same and pronounce judgment thereon, as is right and proper.

CLYDE MATTOX,
Petitioner.

By J. W. JOHNSON,
And CHAS. R. REDICK,
And D. O. LEWIS,
His Attorneys.

117 In the above-entitled proceedings in error for the district court of the United States of America of the district of Kansas.

The petitioner, Clyde Mattox, makes the following assignment of errors:

First. The said district court erred in refusing to quash the indictment herein upon the motion of the defendant.

Second. The said district court erred in overruling the demurrer to the said indictment herein, as interposed by the defendant.

Third. The said district court erred in the rejection of the testimony of the witness O. H. Violet, offered on the part of the defendant, in refusing to permit said witness O. H. Violet to answer the following question propounded by the defendant's counsel, to wit: (Question.)

Fourth. The said district court erred in the rejection of the testimony of the witness S. L. James, offered on the part of the defendant, in refusing to permit the said witness James to answer the following question propounded by the defendant's counsel, to wit: (Question.)

Fifth. The said district court erred in permitting the introduction by the Government of the testimony of the deceased witness, Thomas Whitman, over the objection of the defendant, and in permitting the same to be read to the jury, as the record of the testimony of said Whit-

118 man, delivered in said cause on a former trial thereof.

Sixth. The said district court erred in permitting the introduction of the testimony of the deceased witness, George Thornton, over the objection of defendant, and in permitting the same to be read to the jury as the record of the testimony of the said Thornton given in a former trial of said cause.

Seventh. The said district court erred in refusing to give to the jury instructions No. 1–17, inclusive, as prayed for by defendant, and in the refusal to give to said jury each of said instructions and every one thereof.

Eighth. The court below committed error in overruling the defendant's motion for a new trial, in which said motion all of the aforesaid rulings and refusals were presented to the court, and the exceptions thereto and to the ruling of the court in refusing to grant said new trial the defendant then and there duly excepted, and still excepts.

Ninth. The court erred in refusing to sustain and in overruling the defendant's motion made in arrest of judgment, for the reasons therein stated.

Tenth. The court erred in not remitting the indictment to the circuit court of said district of Kansas upon its presentment to said district court under section 1038 of the Revised Statutes of the United States.

Eleventh. The court erred in entertaining jurisdiction of said
119 case and in trying and sentencing the defendant, for the reason that it appears from the record that, prior to the finding of the indictment herein, the district court of Kansas had been recreated by act of Congress, and the territory in which the offense charged in the indictment was committed was not by said act reattached to said district of Kansas.

Twelfth. The court erred in trying and sentencing the defendant, for the reason that it appears from the record that the offense charged was not committed in the district of Kansas, but was committed in the district of Oklahoma, which had been theretofore created by law.

Respectfully submitted.

J. W. JOHNSON,
CHARLES R. REDICK,
D. C. LEWIS,
Attorneys for Defendant.

(Endorsed:) No. 900. United States vs. Clyde Mattox. Bill of exceptions filed March 8, 1894. Geo. F. Sharitt, clerk.

120 Before the Supreme Court of the United States.

CLYDE MATTOX, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

Points relied upon for stay of sentence and execution.

1. Said verdict is against the weight of the evidence.
2. Said verdict is not sustained by sufficient evidence.
3. Said verdict is against the law.
4. The court erred in the admission of testimony over the objection of the defendant.
5. The court erred in refusing to admit the testimony offered by the defendant in this, to wit, in refusing to admit the testimony of O. H. Violet and S. L. James as to the declarations made to them by one of the Government's witnesses, Thomas Whitman, "to the effect that his testimony given in the above-entitled cause at a former trial of the same was wholly false and untrue."
6. The court erred in admitting, and permitting to be read to the jury, the testimony of Thomas Whitman against and over the objections of the defendant.
7. The court erred in admitting, and permitting to be read to the jury, the testimony of George Thornton against and over the defendant's objections.
8. The court erred in refusing the instructions numbered from 1 to 16, inclusive, asked by the defendant to be given to the jury.
9. The court erred in refusing to give each and every one of the instructions asked for by the defendant.
10. This court had no jurisdiction to try and determine said cause,
121 nor to receive the verdict therein, or to render judgment thereupon.
11. The court had no jurisdiction to try this defendant for the

offense charged in the indictment, to wit, murder; but should have, by order of said court, remitted said indictment from the United States district court of Kansas to the United States circuit court in and for that circuit.

12. That all of the proceedings herein since the returning of said indictment into the district court of Kansas are wholly void.

13. That the district court had no jurisdiction of the offense charged, or to receive the indictment herein, or to cause the apprehension of this defendant therein, for the reason that said offense does not appear to have been committed within said district of Kansas.

14. That the court has not now authority or jurisdiction to pass sentence or judgment upon the defendant herein, and said court never did have power and authority to pass sentence and judgment as aforesaid.

REDICK, LEWIS & SNYDER,
Attys. for Deft.

W. W. DUDLEY,
S. T. MICHINER,
of Counsel.

(Endorsed:) No. 900. Clyde Mattox, pltf. in error, vs. The United States. Motn. for stay. Before Mr. Justice Brewer, in chambers, Washington, D. C., March 16th, 1894—10 o'clock a. m. Filed Mach. 19, 1894. Geo. F. Sharitt, clerk.

122 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, clerk of the district court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the record and proceedings in said court in the case of the United States vs. Clyde Mattox, No. 900.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said district of Kansas, this 21st day of March, A. D. 1894.

[SEAL.] GEO. F. SHARITT,
Clerk.

By ,
Deputy Clerk.

123 (Indorsement on cover:) Case No. 15539. Term No. 1155. Kansas D. C., U. S. Clyde Mattox, plaintiff in error, vs. The United States. Filed March 24th, 1894.

Office Supreme Court, U. S.
FILED.
SEP 17 1894
JAMES H. McKENNEY.

IN THE

Supreme Court

—OF THE—

UNITED STATES.

CLYDE MATTOX, *Plaintiff in Error,*
vs.
THE UNITED STATES.

667

BRIEF OF PLAINTIFF IN ERROR.

CHARLES R. REDICK, D. C. LEWIS, W. K. SNYDER,
Attorneys for Plaintiff in Error.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

CLYDE MATTOX, *Plaintiff in Error*,
vs.
THE UNITED STATES.

BRIEF OF PLAINTIFF IN ERROR.

CHARLES R. REDICK, D. C. LEWIS, W. K. SNYDER,
Attorneys for Plaintiff in Error.

ABSTRACT OF RECORD.

Indictment for murder in first degree was returned against the plaintiff in error the September term 1891, of the District Court of the United States at Wichita, Kan; at the September term of said court he was tried and convicted. He prosecuted writ of error to this court and the judgment of the lower court was reversed and case remanded for new trial.

At the *next* term of the same court the second trial was had and resulted in a disagreement and the case was continued until December term A. D., 1893. At that term defendant was put upon his third trial. On the trial he objected to the reading of the reporters notes of the testimony given against him on his former trial by one Thos. Whitman, and one George Thornton, who were since deceased. The court over-ruled his objection and permitted the testimony to be read, to which exception error was taken, and which rulings are assigned as error. See printed record pages 14 to 30 inclusive and pages 33 to 37 inclusive.

To sustain his defense, plaintiff in error offered to show by witnesses: that witness Whitman had made contrary statements out of court, and had, after his former testimony, stated to them that he had *testified falsely*. This the court refused to permit him to do, to which ruling exceptions were taken, and this is assigned in said assignment as error. See printed record page 52.

The verdict of the jury simply found the defendant "guilty as charged." See page 49 of printed record, and the motion for a new trial claimed this as an insufficient verdict upon which to pronounce sentence of death. See printed record page 50, twelfth assignment.

Motion in arrest of judgment made the same point. See printed record page 50. They were both over-ruled, exceptions taken, and errors duly assigned.

Motion in arrest of judgment was also based on a claim that the District Court of Kansas had no jurisdiction of capital case—that the case should have been tried in Oklahoma—as the offense was committed there prior to the passage of the act creating Oklahoma, but prior to the finding of the indictment herein the Territory and District of Oklahoma had been ascertained and declared.

It was also claimed in the motion in arrest that the

Act of Congress of June 9th, 1890, creating two divisions in the District of Kansas, did not give the District Court of Kansas jurisdiction over any offense committed in the Oklahoma country. See printed record page 50.

Motion for new trial. See printed record page 49.

Motion in arrest of judgment. See printed record page 50.

These motions were both over-ruled, exceptions taken and assignment of error duly made.

Stay of execution until action of this court was directed by Mr. Justice Brewer. This abstract or statement of the case as shown by the record seems sufficient to explain the errors assigned upon which a reversal is confidently hoped and expected.

SPECIFICATION OF ERRORS.

First.—The court erred in admitting to the jury the reporters notes of the testimony of Thomas Whitman, a witness for the government on a former trial, and since deceased. This testimony was the strongest evidence against the Plaintiff in Error. It was the testimony of an alleged eye witness and was in substance as follows:

Q. Is your name Thomas Whitman?

A. Yes, Sir.

Q. Where do you live?

A. Oklahoma City.

Q. How long have you lived down there?

A. Ever since the week it opened.

Q. Know Laura Walker?

A. Yes, Sir.

Q. How near did you live to her house in December?

A. I lived the next house.

Q. Which way from it?

A. East.

Q. What did your family consist of at that time?

A. I had a daughter.

Q. A wife?

A. Yes, Sir.

Q. Do you know Clyde Mattox?

A. Yes, Sir.

Q. When did you first get acquainted with Clyde?

A. Ever since I have been in the country.

Q. Do you remember the killing of John Mullen?

A. Yes, Sir.

Q. How long had you known Clyde before that time?

A. About three months, I guess.

Q. Where did you first get acquainted with him, do you remember, or find out who he was?

A. I have been acquainted with him ever since I have been there—on the streets.

Q. Did Clyde have any business at that time?

A. No; he didnt. When I first got acquainted with him.

Q. Yes.

A. I don't think he had been; he had been—

Q. Did he have any business at the time Mullen was killed?

A Yes, Sir.

Q. What was it?

A. He was deputy, I suppose, he was acting deputy.

Q. Deputy what?

A. Marshal.

Q. Town Marshal?

A. Yes, Sir.

Q. Deputy Mashal of the City of Oklahoma?

A. Yes, Sir.

Q. Had you ever been with Clyde?

A. That day I was.

Q. What day?

A. The day he killed John.

Q. Where?

A. Right across the street where he shot John at

Q. What were you doing?

A. He had an old man arrested. I wasn't doing anything that day.

Q. Who was the man he had arrested?

A. I don't know the old gentleman; he was a Bohemian.

Q. You don't know his name?

A. No, Sir.

Q. How did you happen to be where Clyde was that day?

A. It was not from my house, about five blocks from me, I guess.

Q. You mean that is where the man was arrested?

A. Yes, Sir.

Q. Did you have any talk with Clyde that day?

A. No, Sir. He did tell me—

Mr. Johnson, I object unless it has reference to this matter. (Objection over-ruled. Defendant excepts.)

Q. Did you have any talk with him that day?

A. Yes.

Q. Any talk any day prior?

A. Yes, Sir.

Q. In that talk that day did he call you by any name?

A. No. Sir; he didn't.

Q. I mean when the old man was arrested?

A. No, Sir.

Q. Were you present when John Mullen was shot?

A. Yes, Sir.

R. When was it?

A. It was in December, I thlnk.

Q. What year?

A. I think 89.

Q. How long ago? How many Decembers ago?

A. Well, it was—

Q. First one after you were there?

A. Yes, Sir.

Q. Who else was present when John was shot?

A. Well, my wife she had her hand on this shoulder (indicates) of mine.

Q. Which shoulder?

A. This one (indicates).

Q. The left?

A. Yes, Sir.

Q. What is her name?

A. Charity.

Q. Did you see any one else there?

A. No, Sir, I didn't.

Q. How long did you know John Mullen, about?

A. I don't exactly, about three or four months; about four months'; I think.

Q. What sort of a man was he physically healthy?

A. John was a healthy man.

Q. What first attracted your attention there that evening to any trouble there, if any thing?

A. At what time.

Q. I say what attracted your attention to it?

A. At night or that day.

Q. The night of the trouble?

A Two women's cries in the street.

Q. Did you see the women?

A. No, Sir.

Q. Did you know who they were?

A. Yes, Sir.

Q. Who were they?

A. Lizzie Wall and Laura Hudson.

Q. Were they colored women?

A. Yes, Sir.

Q. Did you know where they were on the street when they hollered?

A. No, Sir.

Q. What did you hear that attracted your attention?

A. They screamed, one of them.

Q. How far were they from your house?

A. They were just across the street, the house nearly facing mine.

Q. Where were you when you first heard the screaming?

A. A setting in my house.

Q. Who was in there with you?

A. My wife.

Q. What did you do when you heard this cry?

A. I jumped up an ran out.

Q. When you got to the door, what did you see?

A. I never seen any body when I got to the door. In a short time Clyde and his partner came across the street and asked John "What in hell he was hollering at him across the street" Clyde came across the street and asked John "What in hell he was hollering at him" John told he had no right to scare women in the dark, and Clyde told him to shut up, and John told him he wouldn't, do it, and Clyde put one foot on the door and stepped up and fired twice, and the other man once.

B. How much yard was there to that house?

A. About three feet.

Q. Was there a fence in front of the house?

A. Yes, Sir.

Q. Where were these men when you first saw them?

A. Not quite to the gate.

Q. What did Clyde have to shoot with?

A. A revolver.

Q. Did you notice how John was standing when he was shot?

A. Yes, Sir.

Q. Indicate to the jury how he was standing. Stand up.

A. The house was facing north. John stood this

way. When John was falling the other ball shot him right in there.

Q. Both young boys?

A. Yes, Sir.

Q. Did you know who the other man was?

A. No. Sir; I didn't. I have seen him several times.

Q. How far was you standing from Clyde when you say he shot John Mullen?

A. I was standing close to him; as close as that jury. I stopped out side the door; just that way [indicating]. he put one foot upon the door, like that.

Q. Are you sure that was Clyde?

A. Yes, Sir.

Q. Did he speak to any one except Mullen?

A. He spoke to me when he first got in the yard. Said "Hello Joe" and struck me on the shoulder.

Q. What else did he say?

Mr. Johnson. Well well—

Q. Anything else?

A. He said "I know you;" I said "Yes, I know you, too."

Q. Was that before or after the shooting?

A. Before the shooting.

Q. How near was your wife standing to you at that time?

A. She had her hand on my left shoulder.

Q. Which way from the door?

A. Facing north.

Q. Which way from you?

A. She was standing on the east side from me

Q. Your wife was?

A. Yes, Sir.

Q. You know about what time it was?

A. At night.

Q. Yes.

A. Between eight and nine o'clock; I don't know

exactly: I think it was a quarter past nine when I went to jail.

Q. When you went to jail? What for?

Mr. Johnson. I object to that?

By the Court. I don't see the materiality.

Q. State whether you went to jail for any offense?

A. Thornton carried me to jail to keep me out of the boys' way.

Q. Thornton.

A. Yes, Sir.

Q. I want to know whether you was arrested for a crime?

A. No, Sir.

Q. How many shots were fired?

A. Three.

Q. How many did Clyde fire?

A. Two.

Q. Who fired first?

A. Clyde Mattox; twice.

Q. What did John Mullen do during the shooting?

A. Not a thing, The pistols were fired as fast as they could; John was falling, Clyde shot the last time; John was falling and the other boy shot him right in there (indicates.)

Q. Did you see John Mullen afterwards?

A. Not that night; the next morning.

Q. Did you see the wounds on his body?

A. Yes, Sir.

Q. Where was he shot?

A. One ball went in the right arm right in there; and one right in here, and the other right in his hip (indicates.)

Q. How many times was he shot?

A. Three.

Q. Were you there when he died?

A. No, Sir; I was in town.

Q. Did you see him after he was dead?

A. Yes about five minutes.

Q. What time did he die?

A. About fifteen minutes past two o'clock.

Q. Was you any relation to John?

A. No, Sir.

Q. What relation was you to Laura?

A. Her daughter is my wife.

Q. Where did you live prior to going to Oklahoma?

A. I staid in Varginny. The year before going to Oklahoma, Fort Smith, Arkansas.

CROSS EXAMINATION OF THOMAS WHITMAN BY MR. JOHNSON.

Q. How long did you say that you know Clyde before Mullen was shot?

A. I know him ever since he came to the country. Ever since his — .

Q. When did you come to the country first?

A. In June, the year it opened.

Q. How long do you say it was after you went there before you became acquainted with or knew Clyde?

A. It wasn't very long after that, because I got acquainted with him in a short time.

Q. Well, had you met him— How many times had you met Clyde or conversed with him prior to the night on which John was killed—that is, before that night?

A. I never had any talk with him at all before that day.

Q. That day was the first time you ever talked with him?

A. Yes, Sir.

Q. Tell the jury how many times, according to the best of your judgment, you had seen Clyde before that night at the time you say John was shot?

A. I could not tell, because I saw him nearly every day.

Q. What did you see him doing during these times?

A. Sometimes gambling and some times he wasn't

Q. Somes times what?

A. Some times gambling.

Q. Did you ever see him gamble?

A. Yes, Sir.

Q. Are you certain?

A. Yes, Sir.

Q. Where?

A. Right across from the depot,

Q. How many times in your judgment, will you say you saw him gamble?

A. Not but one time.

Q. About when was that time?

A. I don't know what time that was.

Q. Give your best judgment?

A. I could not say what time it was.

Q. About when?

A. It was shortly after—about a month, I guess, before he killed John.

Q. Well, you think you saw him gamble during the month of November?

A. Yes, Sir.

Q. What time in the day or night was it you saw him gamble?

A. It was on Saturday. I don't know what time of day.

Q. Was day or night?

A. Day.

Q. Before or afternoon?

A. I could not say, but I think it was before 12 m.

Q. What do you say as to the time of day it was?

A. Before twelve o'clock, I think; I don't know.

Q. Can you tell who else was in that room at that time?

A. No, Sir.

Q. Was there anybody else there?

A. Yes, Sir.

Q. Other parties you knew?

A. I know Jack.

Q. Any body besides Jack and Clyde?

A. No, Sir.

Q. What game was it?

A. I don't whether he was playing poker or not.

Q. That was about a month, you think. before. Had you never seen him gambling on any other occassion at that place or any other place?

A. No, Sir.

Q. You say you got acquainted with him soon after you came there?

A. Yes, Sir.

Q. You came there in June? About what date was came there?

A. I don't know,

Q. First part of month or the last?

A. It was in the middle of June, I suppose; I don't know.

Q. What is your judgment as to whether you learned to know who Clyde was during the month of June?

A. No, Sir.

Q. When was it oou first learned to know him; in July or August?

A. I had been knowing Clyde ever since I had been there; I don't know what month it was in.

Q. How long had you been there before you knew Clyde; as to your judgment how many weeks?

A. I could not say.

Q. Where did you first know him?

A. He was travelling up and down the street like any other gambler.

Q. Is it your judgment it was late in the month of July you first learned to know Clyde?

A. I didn't say.

Q. Saw him travelling up and down the streets during the ——— was there a months time after you went there that you didn't see Clyde?

A. I don't think there was.

Q. What do you say as to whether you saw him during the month of July?

A. I don't say.

Q. What do you say as to whether you saw him during the month of August?

A. It wasn't very long; I had come back from Wichita; I knew him after I had went back home. He was there when I got back there.

Q. Did you ever know Clyde until you came back from Wichita?

A. He was at home in Oklahoma City when I knew him.

Q. When you first knew him? Did you know him before he came to Wichita?

A. No, Sir.

Q. You knew him after he came back from Wichita? Tell the jury you saw this man during the month of July?

A. I don't say.

Q. What is your best recollection as to how long it was after you went there in June until you learned to know Clyde Mattox?

A. I believe it was in July; I wouldn't be positive.

Q. Give your best judgment. Do you know where it was when you first learned to know who he was?

A. It was on the corner of Main Street.

Q. Do you know what he was doing?

A. He and old man Hines son were talking together.

Q. Talking together?

A. Yes, Sir.

Q. And that was the first time you knew him?

A. Yes, Sir.

Q. And you think it was the month of July?

A. I think it was.

Q. How long a time was it after you first knew him up to the time of this shooting that you didn't see him; what was the longest time you didn't see him?

A. It may have been a week or two weeks.

Q. Did you after you first knew Clyde see him every week or two up to the time of the shooting?

A. No; I didn't because I worked at the—— house; some time I didn't see him at all for a week.

Q. I say every week or two.

A Nearly every week or two.

Q. Travelling up and down the streets ?

A Somes times he was and some times he wasn't.

Q. You saw him up to the time and learned to know him well by the time you saw the shooting?

A. Yes, Sir.

Q. You never talked with him, however, up to this day, the day before the shooting?

A. No, Sir; I didn't.

Q. Well you had a little conversation with him on this night; at the time of the shooting you saw him—at the time of the shooting?

A. Yes, Sir.

Q. Can you tell the jury what kind of a night it was as to being light or dark?

A. It was a starry night.

Q. What about whether it was dark or light? How far could you recognize a man that you knew?

A. The door was standing open, the door was

standing open, the table stood about here, [indicates] there was a big lamp on the table and on it a globe and you could see outside of the gate by that.

Q. I only ask you as to the character of the night; how far, in your judgment, you could see a man not in the ltght and recognize him?

A. I don't suppose you could see him very far.

Q. When you heard this noise what were you doing?

A. I was sitting on the side of the bed.

Q. What was your wife doing?

A. She was straightening up the bed.

Q. Either of you undressed in whole or in part?

A. How is that?

Q. Either of you undressed?

A. No, Sir.

Q. Had you none of your clothing off?

A. One shoe off.

Q. Had your wife any of her clothing off?

A. I don't think she did; no sir; she did'nt.

Q. Remember and say whether at the preliminary examination you didn't state and your wife also, that she had undressed and went out there in her night clothes?

A. I don't think she did; but I know I wasn't because I didn't go back in the house any more.

Q. Was there a light in your house?

A. Yes, Sir.

Q. Also a light over where John was?

A. Yes, Sir.

Q. You heard this noise across the street and went out at once?

A. Yes, Sir.

Q. Did you see these parties across the street?

A. I never seen them until they got to the gate.

Q. The gate to front of John's house?

A. Yes, Sir.

Q. How far was the gate?

A. About four feet from the door.

Q. Was there a gate through or an open way?

A. Gate through.

Q. What kind of a fence?

A. A paling fence.

Q. Any fence between the house and your house?

A. There was.

Q. You lived on a twenty-five five lot did you?

A. Yes, Sir; front.

Q. One of those twenty-five lots?

A. Yes Sir.

Q. Next east of the lot on which John and Mrs. Walker were living?

A. Yes, Sir.

Q. When you saw them coming close to the door where were you?

A. I was got right up side to the door; when I see the boys' walking up I slowed up.

Q. What made you go to John's?

A. Didn't I hear them coming across the street.

Q. Is that why you went?

A. Yes, Sir.

Q. You heard them walk?

A. Yes, Sir.

Q. Was it muddy or dry?

A. Dry,

Q. Frozen?

A. No, Sir.

Q. You could not see them? but heard them walking?

A. Yes, Sir.

Q. You could tell that they were coming across towards the house?

A. Yes, Sir.

Q. You hadn't heard anything said up to that time?

A. Not until they got to the door.

Q. Did these parties who came over there open the gate?

A. Clyde and that other boy, they pushed the gate open and walked in.

Q. When they walked in where were you standing?

A. About three feet from the door.

Q. What direction from the door?

A. East,

Q. Where was your wife?

A. Right behind me.

Q. Standing right behind you?

A. Yes. Sir.

Q. Now, when these parties came in one walked up and called you Joe?

A. He did. He said "Hello Joe I know you."

Q. What did you say?

A. I said "Yes I know you too."

Q. What was said up to that time, if anything, between these two men and John Mullen; what was said between these two men and John Mullen?

A. The first Clyde said "What in hell are you hollering to me out in the street." John said "You have no right to scare these women." Clyde said "Shut up" and told him to throw up his hands. He said he wouldn't. Clyde shot him twice and the other boy once.

Q. Where was Clyde standing?

A. He hadn't put his foot on the door; when he said that to him he put one foot on the door.

Q. Was there a step in front of the door?

A. One step, Yes.

Q. Do you know how high the door was in front? The bottom facing of the door?

A. It wasn't as high as that step (points to step.)

Q. So it was; there was a step out in the front of the door; what kind of a step was that?

A. Just one plank.

Q. How broad was it?

A. About a foot and a half.

Q. What foot did Clyde put on the door step?

A. I could not say as to that he put one.

QYou are certain of that; this man you call Clyde put a foot up?

A. Yes, Sir.

Q. Did he put his foot in front of the door or on the door sill?

A. In front of the door.

Q. And commenced shooting?

A. Shot him twice.

Q. Mullen attempted no movement towards him at all?

A. None at all.

Q. You were still standing there?

A. Yes, Sir.

Q. You knew Clyde Mattox at that time?

A. Yes, Sir.

Q. Clyde knew you.

A. I suppose so; he recognized me.

Q. He had talked to you that day?

A. Yes, Sir.

Q. Can you tell how he was dressed?

A. A broad brimmed black hat and a little knitted coat.

Q. Did he have on an overcoat?

Q. He had on two coats; a knitted coat the coat he had on that day, and that night he had on a black overcoat.

Q. Was the coat buttoned up?

A. I don't it was; either one of them.

Q. When did you first see his pistol?

A. Not until he told John to throw up his hands,

Q. Could you tell where he got his pistol from?

A. I don't know whether he got it out of his side pocket or out of a belt.

Q. Did you see the pistol when he was pulling it out or in his hand?

A. Not until he pulled it out and was holding it in both hands.

Q. You cannot tell where he got it from; from his pocket, or belt, or where, you don't know?

A. No, Sir, I would not say

Q. Where was your child on that night?

A. She was on the bed with the old lady.

Q. What old lady?

A. My mother-in-law.

Q. Mrs. Walker.

A. No, Sir.

Q. Was John Mullen living with her.

A. Yes, Sir.

Q. Were they married?

A. No, Sir.

Q. Were you and John good friends?

A. Yes, Sir.

Q. How long had you known John Mullen?

A. I hadn't known him more than four months.

Q. Had he been living with the old lady all of that time?

A. No, Sir.

Q. How long had he been living with the old lady?

A. I could not say

Q. About?

A. I suppose about a couple of months.

Q. You and he were good friends at that time?

A. He didn't never do anything to me and I never did anything to him.

Q. You were good friends?

A. Yes, Sir.

Q. Did you know Frank Wolf?

A. I do.

Q. How far does he live from where you lived at that time?

A. Let me see six lots between us.

Q. What direction did he live?

A. West.

Q. Did you see him on that night?

A No Sir, I didn't.

Q. Did you not see him right almost immediately after the shooting?

A. No, Sir; because in about ten minutes after the shooting I went to jail.

Q. I ask you if you didn't see him within five minutes after the shooting?

A. I did not.

Q. Is it not true that he came out almost immediately after the shooting; you came out he asked you who did that shooting and you told him you did not know?

A. I didn't see Wolf that night.

Q. Didn't you say to Wolf that when the shooting occurred you were in your house?

A. I never spoke to him.

Q. Did you say that?

A. I did not.

Q. Do you knew J. W. Housell, who kept the drug store corner of Reno Avenue and Broadway?

A. Yes, Sir.

Q. Do you also know his son, William Housell, in business with him, a young man?

A. I know the boy; I don't know the old man.

Q. Were you in their drug store that night shortly after the shooting?

A. Yes, Sir.

Q. I will ask you whether or not you did not go there envuiring of them where you could find a physician; upon being asked what was the matter, you told

them John Mullen was shot; and whether or not they didn't ask you who did the shooting and you told them you didn't know?

A. I did because Thornton told me to tell everybody so.

Q. Told you what you told them?

A. Yes, Sir.

Q. Did you not in the latter part of the month of August last, on Main Street, in Oklahoma City, go to Mrs. Hatch Clyde's mother in the presence of Mrs. Hatch and Mrs. Jeff's and there say to Mrs. Hatch that you had received a despatch from Soper to come to Wichita, and asked her to lend you money to come on; $5.00; and upon her saying to you that it was strange that you should ask her for money, that you were going to swear her boys' life away, you said to her: "Mrs Hatch, I will not do it; it was too dark; I cannot say it was Clyde.

A. I did not.

Q. Do you know one J. E. Love who lives at Oklahoma City?

A. Yes, Sir.

Q. I will ask you whether or not during the month of July or August in his presence and that of W. C. Wells—do you know Wells?

A. I do.

Q. You didn't say to Mrs. Hatch that you were not certain; that you were mistaken before; that it was too dark, you were frightened, and you could not say it was Clyde and you never would again?

A. No. Sir.

Q. You didn't say that?

A. No, Sir.

Q. Did you obtain a physician on that night to go to see him?

A. Yes, Sir.

Q. Who was it Tom?

A. Dr. Graham.

Q. Dr. Graham? You walked down with the Doctor didn't you?

A. Yes, Sir.

Q. Showed him where it was—where this wounded man was?

A. Yes. Sir.

Q. Did you not on the road there talking with Dr. Graham tell him that you didn't know who did the shooting?

A. I didn't tell him any such thing?

Q. Didn't tell him that?

A. No. Sir.

Q. Do you know one East commonly Doc or Doctor?

A. Yes, Sir.

Q. T. H. East?

A. Yes, Sir.

Q. Had you a conversation with him in Oklahoma City a short while after this occurred?

A. Yes. Sir.

Q. Did you not in that conversation tell East you didn't know who did this shooting?

A. I did not.

Q. What had you in your hand that night when you went out there?

A. I had a Winchester.

Q. A Winchester rifle?

A. Yes. Sir.

Q. Was it loaded?

A. Yes. Sir.

Q. Did you do anything with it?

A. No. Sir.

By the Court, what is the object of this. Mr Johnson to show his condition.

Q. How long a time did you remain there? By the door near to this building after the shooting before you went away?

A. I went away in about two minutes; I didn't go into the house.

Q. You didn't go to the house?

A. No, Sir.

Q. Where did go when you went away?

A. I went and got Tom and he told me to get the doctor.

Question asked by a Juror. I would like to ask you one question, you said something about seme one being in jail. Was it you or do I understand you to say there was some one in jail?

A. I said I had been knowing Clyde Mattox ever since he came out of jail.

RE-DIRECT EXAMINATION BY MR. ADY.

Q. Did you say you had any conversation with Frank Wolf about this matter?

A. No, Sir, I didn't.

Q. Did you ever have any conversation with him?

A. No, Sir.

Q. Did you say you had a conversation with Housell at his drug store after the shooting that night?

A. Yes, Sir.

Q You told him you didn't know who did the shooting?

A. Yes, Sir.

Q. Did you say who you told that?

A. Yes.

Q. Why was it?

A. Tom told me to tell everybody until he got Clyde.

Q. Who told you ?

A. Thornton.

Q. Who was he?

A. Deputy United States Marshal.

Q. Was that why you made that statement to Housell?

A. Yes, Sir.

Mr. Johnson. I object.

Q. Do you know if that was the reason you were put in jail that night?

A. Yes, Sir.

Q. Do you know T. H. East?

A. Doc East, Yes. Sir.

Q. When was it about how long ago?

A. Three weeks ago; I have been——two weeks to day; it was the day before I came here.

Q. Were you ever jail in Wichita?

A. No, Sir.

Q. Any where for any offense?

A. No, Sir.

RE-CROSS-EXAMINATION BY MR. JOHNSON.

Q. You say you were never in jail for any offense?

A. No, Sir.

Q. Were you not arrested and put in jail?

A. No, Sir.

Q. You were not arrested about three weeks ago for whipping your wife?

A. No, Sir, I wasn't, you can't get a man in Oklahoma City to say so.

Q. You testified as a witness in the preliminary examination nearly two years ago when Clyde was examined in Oklahoma City before Major Munroe?

A. Yes, Sir.

Q. I will ask you whether or not I was present?

A. I suppose you was

Q. I was representing Mattox wasn't I? I will ask you if at that preliminary as I did today whether you didn't say to the two Housell's on that night that you didn't know who did the shooting?

A. No, Sir.

Q. You didn't say so; you didn't say it didn't you answer me in that way?

A No, Sir, I didn't.

Q. You remember my asking the question don't you?

A. I don't remember.

Q. Don't you remember that I, at the preliminary examination asked you whether you did not say to Dr. Housell and to his Son within fifteen minutes after the shooting that you did not know who it was that did the shooting?

By the Court that's all gone over.

Q. I will ask you if at that time you didn't deny it and say that you didn't say it at the preliminary examination?

B. No, Sir.

Q. Tom on the night that Mullen was killed did you see Thornton before—or after you went to Dr. Housell's drug store?

Q. Where did you meet Thornton?

A. On the corner of Broadway and Reno I believe.

Q. Broadway and Reno?

A. Yes. Sir.

Q. Dr. Housell's store was on the corner of Broadway and Reno wasn't it?

A. I don't think it was on the corner; right in front of—right by Judge—real estate office.

Q. Did you go into Dr. Housell's store when you first went to the street?

A. No, Sir.

Q. Tom do you know where Mrs. Hatch lives in Oklahoma City?

A. I do.

Q. I will ask you whether or not you went to Mrs. Hatch's house in the month of June last and asked her for some money?

A. No, Sir.

Q. Didn't you say there you had come to talk to me about the Mattox case and I said "I do not want to talk to you about it because I am the attorney on the other side and that all anybody will ask of you is to tell the truth?"

A. You didn't say that.

Q. Who was with you?

A. Bill Rose, he stopped at the gate.

Q. Didn't he go around with you?

A. No, Sir, he wasn't standing where you and I was

Q. Didn't he go around the house?

A. No, Sir.

Q. Do you say Tom that I ever talked to about this case?

A. Not since that Sunday.

Q. Did I ever since?

A. No, Sir.

Q. Did I talk with you about this case there?

A. Excusing that case you never did.

Q. I ask you whether I talked to you about that case at all at that time?

A. You told me I may be mistaken in the man didn't you.

Q. No, Sir, I didn't.

By the Court (to Mr. Johnson) you are not on trial. Mr. Johnson I think I am his attorney.

Q. Did you come to my front gate?

A. Yes, Sir.

Q. You came into my yard; did you call me to the gate?

A. I told you I went in the yard through the gate didn't I?

Q. I will ask you if it is not true that you came and opened the gate and walked in and around to the back porch and as you passed the front porch said to me "Mr. Johnson I want to see you."?

A. No, Sir.

Q. Didn't you say to me, "I have been to see Mrs. Hatch and she sent you to me "; didn't you?

A. Yes, Sir.

Q. Didn't I say "I am attorney for Mattox; you are a witness against him, and all I want you to do is to tell the the truth?

A. You said that too.
That's all

Mr. Ady.

Q. Said also you may be mistaken?

A Yes, Sir.

Mr. Johnson to [Mr. Ady] I say to you that I didn't say it,

Q. Is it a fact that Mrs. Hatch has frequently sent for you to talk about your testimony and hunted you up ?

A. Yes, Sir, she has. She sent me to Mr. Johnson.

Q. You may state Tom, whether during this whole time you have been in fear of Clyde Mattox, his mother or other friends?

A. Yes, Sir.

Second.—The Court erred in admitting to the jury the reporters notes of the testimony of George Thornton, a witness for the government, at a former trial and since deceased. The substance of this testimony is as follows:

Q. State your name to the jury, please.

A. George E. Thornton.

Q. Where do you reside?

A. In Oklahoma City.

Q. Since how long have you resided there?

A. Since the spring of 1888 I have been there.

Q. Since what time have you known Clyde Mattox?

A. I became acquainted with him shortly subsequent to the opening, some time about the first of May 1889.

Q. Did you become well acquainted with him?

A. Fairly well; Yes.

Q. What position were you occupying at that time?

A. I was Deputy United States Marshal under Marshal Jones of the District of Kansas and the Indian Territory.

Q. From the time you got acquainted with Clyde up to the killing of John Mullen he lived in that community?

A. Yes.

Q. Met him frequently?

A. Yes, every day or so; some times oftener.

Q. Do you remember the killing of John Mullen?

A. Yes, Sir.

Q. Remember the date?

A. It was on the twelfth day of December 1889.

Q. What time in the day?

A. It was about ten twenty p. m.

Q. Where were you at the time the shooting occurred?

A. I was in my office on Broadway between Main and First.

Q. How far from the place of the shooting?

A. A trifle over a half mile.

Q. What first attracted your attention?

A. Three shots.

Q. How rapidly did they occur?

A. [Witness claps his hands]

Q. Upon hearing these shots what did you do?

A. Locked up my writing desk and went towards where they came from.

Q. On your way down did you meet any one?

A. Yes, I met Walter Vends and Thomas Whitman.

Q. About where did you meet them?

A. At the corner of Broadway and California Ave.

Q. How far was that from this place of shooting?

A. Just about half a mile.

Q. From the place of shooting?

A. Yes, just about.

Q. What direction were they going?

A. North.

Q. Rapidly?

A. I think so. It wasn't pitch dark, but still so dark I couldn't see far. When I saw them I noticed they were walking fast.

Q. You may state whether or not you gave Tom Whitman any instructions as to telling who did the shooting?

A. I did.

Q. What instructions did you give?

A. I first asked him to make a statement about the shooting; after he had finished that I told him not to say anything about it to any one unless he knew them to be a reliable officer.

Q. Did you give any one instructions as to putting Tom in jail?

A. Yes, Sir.

Q. Did you order him put in jail for any offense?

A. No. Sir, just for protection to his life.

Q. Did you then begin to search for any one?

A. I did.

Q. Who for?

Mr. Johnson. I object, objection overruled.

A. For the defendant.

Q. Yes; for the defendant.

Q. State what search if any you made for the defendant immediately after the shooting?

A. I went to the north bound local train; it came in just immediately after I left Vends and Whitman, and searched the passenger coach, then to the freight cars, and then I told the conductor I would like to ride on the train until I reached a point as I might think proper to get off. He told me to go and see the engineer and ask him to stop wherever I asked him to.

Q. It is unimportant to give the conversation?

A. I rode up in the engine until I decided there was no use in going farther, he slacked the train, I jumped off and went around through the town and there I met a friend of mine named Tom Wade.

Q. What was he?

A. He was a Deputy United States Marshal at that time from the Sac & Fox Reservation.

Q. If you got any one to aid you in the search state their name?

A. I suppose there were twenty-five or more people out that night I think I notified about fifteen; some of the merchants and police and one man that was posseman under me and I told them to look for Clyde Mattox and Doc Eloy. I was looking for them myself.

Q. How long did you keep the search for defendant?

A. I might say for two about days specially; after that just whenever I thought there was an opportunity of seeing him.

Q. Did you know where he lived at that time?

A. Yes, Sir.

Q. Did you go there to search?

A. I did.

Q. Did you more than go; did you stay around the house?

A. Yes, Sir.

Q. About how long after that did you next see Mattox?

A. I not being an officer under this Court at that time, did not pay special attention, but I think it was about two weeks; might have been longer.

Q. Did you know of his being in town about two weeks after?

A. Near that time.

Q. Who had him in custody if any one did?

A. The first time I saw him to know him he was walking up the street; was with his mother, and next I saw him in custody of George Walker.

Q. After that do you know whether he remained in custody or not?

A. I believe he did for awhile; then, I think, he escaped.

Q. Do you know how long he was gone after his escape?

A. No, Sir.

Q. How long have you been in that country?

A. I went to the territory first in 79.

Q. Are you familiar with the lay of the land?

A. Quite familiar.

Q. Do you know the course of the Canadian river.

A. Yes; the general course.

Q. What direction is this from the Canadian river —north or south?

A. North 173 miles.

Q. What direction is it from the 100th Meridian— that is, the western boundary of the Territory: which direction is this land where the killing occurred from the 100th Meridian?

A. East.

Q. East in the lands occupied by the civilized tribes?

A No, Sir, in Oklahoma proper.

Q. Did you serve the process from this court?

A. I did; Yes; under Marshal Jones.

Q. State whether or not it was in a Territory attached to this court?

A. It is or what is now under the jurisdiction of this court.

Q. There is a branch runs near Oklahoma City can you indicate on a little piece of paper how it runs?

A. Yes. Sir, [Witness takes paper and draws.)

Q. Which one of the lines represents the North Canadian?

A. The North.

Q. That one?

A. Yes, Sir.

Q. This point represents Oklahoma City?

A. Yes, Sir.

Q. What does this point represent?

A. Morgan Wright's place.

Q. What direction is that from Oklahoma City?

A. Nearly due west.

Q About how many miles?

A. I think it is about a mile and a half.

Q. Now going west on Choctaw Street, the street on which Mrs. Walker's house stood, what direction is Morgan Wright's place?

A. Nearly west.

Q. Were you familiar with the condition of that river at that time?

A. Somewhat; it was about three days before I saw it I believe there was considerable water in it at that time.

Q. There is the Chickasaw Nation down there is it not?

A. Yes. Sir.

Q. What direction is it from Oklahoma City?

A. A little south-west.

Q. Going due south you strike it? Now, Purcell is down here somewhere isn't it?

A. 34 miles south.

Q. Is the Chickasaw Nation south of Purcell?

A. Yes; Purcell is in the Chickasaw Nation.

Q. South of the South Canadian?

A. Yes, Sir.

Q. What would be the direct course to the Chickasaw Nation from Oklahoma City?

A South or south-east according to the point you wanted to strike.

Q. Was there a road that run past Morgan Wright's to the Chickasaw Nation?

A. A person could take any of these roads running south or south-west and get there.

CROSS-EXAMINATION OF GEORGE THORNTON BY COL. JIMMIE JOHNSON.

Q. What direction is California Street the street on which you met Tom and Vends from Reno Avenue?

A. Due north.

Q. How far; what distance?

A. One block.

Q. Do you remember what place of business was on the north-east corner of Broadway and Reno Avenue at that time?

A. I believe some one had a real estate office there at that time.

Q. The north east corner?

A. Yes; that would be directly north of the hardware store.

Q. I mean the north west corner of Reno and—

A. You said California you mean Reno?

Q. North west corner of Reno and Broadway?

A. Housell's drug store.

Q. And the point at which you met Tom was one block north of that?

A. Yes, Sir.

Q. What direction was the point in which the shooting was done from Housell's drug store?

A Nearly due south; just a trifle east.

Q. You met those parties going north on Broadway?

A. Yes, Sir.

Q. Did you not on that night go to Clyde's house?

A. Yes, Sir.

Q. Whom did you see there if any one?

A. The light was turned low in the front room; I don't believe I saw any one inside of the place.

Q. With whom did you speak, if any one, there at that time at Clyde's home I want to ask you if you remember now speaking to Mrs. Hatch?

A. I believe I spoke to the lady that night, as near as I can recollect. I will state the conversation when you ask the question.

Q. Do you remember what you did say?

A. Some common place remark; didn't amount to anything. just merely anything common place to see what I could learn.

Q. You say the first time you saw Clyde after this shooting you saw him in company with George Walker?

A. No, Sir, I didn't say that.

Q. With his mother?

A. I believe so.

Q. How long was it after the time you saw him with his mother you saw him with Walker?

A. I think it was the same day.

Q. How long is it your remembrance was that after the killing of Mullen?

A. It seems to me it was a couple of weeks; might have been a little longer.

Q. When did the killing occur?

A. On the night of the 12th of December 1889.

Third.—The Court erred in refusing to allow Plaintiff in Error to introduce the testimony offered by S. L. James and O. H. Violet, as tending to impeach the testimony of Thomas Whitman, introduced by the government. The testimony of said S. L. James so offered was stated to have been in substance as shown by questions propounded as follows:

EXAMINATION BY D. C. LEWIS.

Q. Where do you live?

A. Oklahoma City.

Q. Were you acquainted with Tom Whitman in his life time?

A. Yes, Sir.

Q. I will ask you if in Oklahoma City, on November 29th, 1892, Tom Whitman told you that he didn't see Clyde Mattox on the night that he did the shooting because it was too dark; that he could not tell who did the shooting, and that on the next day, the 30th, he told you that all he had testified to on the former trial was false, and that he wanted to leave the country; and further, that on the same day, on the 30th, he told you that if you would go and see the friends of Clyde and get him fifty dollars he would give you twenty-five and take the twenty-five and leave the country, as he didn't want to appear against Mattox, and you then asked him why, and he said his reason was because what he had sworn to was not true?

Objected to by the government. The objection sustained. See pages 41 and 42 of printed record.

O. H. Violet above referred to being called on behalf of the defendant testified as follows:

QUESTIONED BY D. C. LEWIS.

Q. Where do you live?

A. Oklahoma City.

Q. Were you acquainted with Tom Whitman in his life time?

A. Yes, Sir.

Q. I will ask you if in Oklahoma City; Oklahoma Territory, on the 21st day of January, 1891, at Oklahoma City, the witness, Tom Whitman, made declaration relating to the testimony which he had previously given in the case against Mattox, in which declaration he said, emphatically and specifically, that his testimony, therein, was given under threats made to him in the corridors of the Court House in Wichita, he delaring that just previous to his being called to the witness stand he was approached by Captain Stiles, that Captain Stiles shook his finger in his witnesse's face, and told him that if he dared to utter one word on the witness stand in favor of the defendant, Mattox, he, Stiles, would see that he was sent over the road. He further declared if it had not been for said threats of Stiles and others that his testimony would not have been given as it was.

Fourth.—The Court erred in pronouncing judgment on the verdict. The indictment was for murder in the first degree. The verdict was as follows:

In the District Court of the United States, District of Kansas.

UNITED STATES, Plaintiff.
vs.
CLYDE MATTOX, Defendant. } 900.

We, the jury in the above entitled cause, duly empannelled and sworn, upon our oaths, find the defendant Clyde Mattox, guilty, as charged in the indictment.

L. G. MACAULEY,
Foreman.

The judgment of the Court was that Clyde Mattox, the plaintiff in error, suffer death.

Fifth.—The Court erred in exercising jurisdiction to try the case, but should have remitted the indictment to the Circut Court for trial.

Sixth.—The Court erred in exercising jurisdiction to try the case in as much as the offense was committed in Oklahoma Territory and not in the District of Kansas.

Seventh.—The Court erred in exercising jurisdiction to try the case, but should have held that the Territory, in which the offense was committed, was not within the jurisdiction of the Federal Court for the District of Kansas.

Eighth.—The errors here specified are all saved and were presented to the court below in the motion for new trial—in arrest of judgment—Demurrer to the Indictment—Motion to quash, etc., and exceptions duly taken to each ruling therein, and we assume it to be unnecessary to particularly refer to their place in the record in these specifications of error.

ARGUMENT.

The record in this case is not voluminous, It contains little if any immaterial matter. An effort has been made in the presentation of the points herein to sift the wheat from the chaff. The Plaintiff in Error asks for and expects a reversal.

As to the first and second specifications of error, during the progress of the trial, the reporters notes taken at a former trial, between the same parties hereto, and for the same offense, were produced, offered in evidence, and over objections made by the defendant, read to the jury. This we believe to have been error. Our position is that the words of our Constitution: "To be confronted with witnesses against him," mean at each and every trial for the same offense, a defendant shall have the privilege of looking into the faces of the witnesses as they appear against him. These words do not mean, in our judgment, that a defendant shall be permitted: "To hear the reporters notes, taken at a former trial, read to the jury."

The appearance of a witness while on the witness stand—the manner in which he speaks—the expression on his face—the looks from his eyes, often lend more weight to his evidence, or detracts therefrom, than the words that fall from his lips.

The fact that witnesses, after leaving the witness stand, talk with friends and neighbors about what they testified to—how they testified—and often, to supposed friends, why they testified as they did are all reasons why the same witnesses at a subsequent trial should appear in person, go upon the witness stand, and again be subjected to cross examination, and new grounds for

impeachment, if any exist, or have occurred since their former testimony was given, be permitted to be laid; and this case furnishes a novel example why this should be so. The milk is here in the cocoanut; the testimony offered by the defendant of S. L. James and O. H. Violet gives strength to the reason of the above proposition.

The first error complained of occurred during the progress of the trial, to wit; in admitting the testimony of Thomas Whitman, deceased. The second error complained of is the same as the first, to wit: admitting the testimony of George Thornton, deceased. The third error complained of to be noticed here was the refusal to admit the testimony of S. L. James and O. H. Violet

Section 686 of the penal code of California, under the head of "Rights of the Denfendant in a criminal action" declares: "In a criminal action the defendant ie entstled to produce witnesses on his behalf, and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross examined or had an opportunity to cross examine the witnesses; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally, in like manner, in the presence of the defendant, who has, either in person or by counsel, cross examined or had an opportunity to cross examine, the witness, the deposition of such witness may be read, upon it being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state."

In construing the above section of the Criminal Code of California the court used the following language: "There can be little doubt of the foregoing ci-

tation. The defendant in a criminal action is entitled "to be confronted with the witnesses against him, in the presence of the court," and ruled that a reporter's notes of the testimony given on the trial of a former indictment for the same offense could not be read in evidence

See People vs. Chung A. H. Chue, 57. Cala. 567.
People vs. Quirse, 59. Cala. 343.
Overruling the case of the People vs. Devine in 46 Cala, page 46.

The English rule seems to be the same as that laid down in the case of Chung A. H. Chue in 57 Cala. In Greenleaf on Evidence, 15th Edition, Page 235, Note D. Vol. 1, Title: "Testimony of Deceased Witnesses," the following language appears: "In England, such testimony is admissible *only in civil cases*, when the witness is out of the jurisdiction."

This court has also had occasion to say something on the subject under consideration, and if we read accurately and understand correctly the views by the court as expressed, are not averse to those herein written. The court among other things has said: "the Constitution gives the accused the right to a trial, at which he should be confronted with the witnesses against him: but if a witness is absent by his own wrongful procurement he cannot complain if competent evidence is admitted to supply the place of that which he kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants the privilege of being confronted with the witnesses against him, but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he he is in no condition to assert that his constitutional rights have been violated. See Reynolds vs. United States 98 U. S. 155.

There can be and will be no contention, so far as

this particular case is concerned, that the defendant, or any person for him, kept away, or caused to be kept away from the trial, any witnesses against him.

The evidence of Charity Whitman, a government witness, is conclusive as to the cause or reason why Thomas Whitman did not appear and testify. Her testimony is as follows:

Q. Did you live in Oklahoma City in the year 1894?

A. Yes, Sir.

Q. What relation were you at that time, if any, to Tom Whitman?

A. I am his wife.

Q. Where is he now?

A He is dead.

Q. When did he die?

A. He died on the 15th of January.

Q. In what year; do you remember.

A. 1893.

see printed record pages 13 and 14.

On the same point as to the reason why George Thornton did not appear and testify, Elisha Hopkins an other government witness testified as follows:

Q. Your name is Elisha Hopkins?

A. Yes, Sir.

Q. Where do you live?

A. Oklahoma City.

Q. Did you know George Thornton in his life time?

A. Yes Sir, Yes Sir.

Q. How do you know he is dead?

A. I seen him after he was dead.

Q. Did you see his dead body?

A. Yes Sir.

Q. Where?

A. In Mr. Reades the undertakers.

see printed record page 32.

The above must be and will be taken as conclusive

that the defendant, Mattox, was in no way responsible for the absence of these witnesses; we take it, then, that under the rule as laid down in the case of Reynolds vs. the United States, that the reporter's notes, showing what Thomas Whitman and George Thornton had previously testified to, should have been excluded, and if they should have been excluded their admission by the court was reversible error.

The next question we desire to call your attention to is embraced in the third specification of error and the sixth reason given for a new trial, to-wit: "The court erred in refusing to admit testimony offered by the defendant in this to wit: in refusing to admit the testimony of S. L. James and O. H. Violet of declarations made to them by the government witness, Thomas Whitman, to the effect that his testimony given in this case was false." See printed record page 49.

If the court shall hold the law to be that the reporter's notes, as to the testimony of Thomas Whitman and George Thornton, taken at a former trial, were rightly admitted then ought not the District Court to have permitted S. L. James and O. H. Violet to testify? can the testimony of a dead witness, admitted under the circumstances of Whitman's be impeached by showing that the dead witness admitted, after testifying, that he had testified falsely?

On the trial the following questions were propounded to S. L. James by D. C. Lewis, attorney for defendant.

Q. Where do you live?

A. Oklahoma City.

Q. Were you acquainted with Tom Whitman in his lifetime?

A. Yes, Sir.

Q. I will ask you if in Oklahoma City, on Novem- 29th, 1892, Tom Whitman told you that he didn't see

Clyde Mattox on the night that he did the shooting, because it was too dark; that he could not tell who did the shooting and that on the next day, the 30th, he told you that all he had testified to on the former trial was false and that he wanted to leave the country; and further that on the same day, on the 30th, he told you that if you would go and see the friends of Clyde and get him fifty dollars he would give you twenty-five and take twenty-five and leave the country, as he didn't want to appear against Mattox, and you then asked him why, and he said his reason was because what he had sworn to was not true?

The court refused to permit the witness to answer the last of the above questions for the reason assigned by court as appear on page 42 of the printed record.

The defendant then produced O. H. Violet as a witness in his behalf and propounded him the following questions:

Q. Where do you live?

A. Oklahoma City.

Q. Were you acquainted with Tom Whitman in his life time?

A. Yes, Sir.

Q. I will ask you if in Oklahoma City, Oklahoma Territory, on the 21st day of January, 1891, at Oklahoma City, the witness, Tom Whitman, made declaration relating to the testimony which he had previously given in the case against Mattox, in which declaration he said, emphatically and specifically, that his testimony, therein, was given under threats made to him in the corridors of the Court House in Wichita, he delaring that just previous to his being called to the witness stand he was approached by Captain Stiles, that Captain Stiles shook his finger in his witnesse's face, and told him that if he dared to utter one word on the witness

stand in favor of the defendant, Mattox, he, Stiles, would see that he was sent over the road. He further declared if it had not been for said threats of Stiles and others that his testimony would not have been given as it was.

The court refused to permit the witness to answer.

We think this was error, providing the evidence of the deceased witnesses, Thomas Whitman and George Thornton, was admissible, a proposition which we deny for reasons already given.

In Greenleaf on Evidence, 15th edition, vol. 1, pages 235 and 236, under the title: "Of the testimony of witnesses subsequently dead, absent or disqualified," we find the following language— "It is also received, if the witness, though not dead, is out of the jurisdiction, or cannot be found after dilligent search, or is insane, or sick, and unable to testify, or has been summoned, but appears to have been kept away by the adverse party. But testimony thus offered is open to all of the objections which might be taken if the witnesses were personally present."

In 12 Wend on a proposition of this kind the court said: "In this case the witness being dead his evidence taken at a former trial was offered by the planitiff, objected to by the defendant "on the ground of interest of the witness." Objection by the lower court overruled and the evidence admitted. In discussing this question the court said: "This is the first time the planitiff has sought to use the testimony of this witness; and I am unable to discover any reason why his adversaries should not be permitted to take every legal exception to it that they might have taken had he been living and before the court. The decease of Shearer may be a misfortune to the plaintiff, but that is no reason for throwing that misfortune on the defendant." See Crary vs. Sprague, 19 Wend. 41 to 45.

Under the ruling of the District Court the "misfortune" of the death of Thomas Whitman and George Thornton is "thrown on the defendant." The above authority says that is wrong.

To the same point see American and English Encyclopædia of Law, vol. 17, page 110, paragraph M.

It seems to be the well established doctrine in the State of Mississippi that where evidence of a deceased witness, given under oath, in a judicial proceeding, between the same parties, on the same issue, is offered in evidence that the party effected by the testimony may contradict the same. See 63 Miss. 452. 51 Miss. 881.

The States of Georgia, Ohio, Illinois, Massachusetts, and Missouri hold the same, and in the above states it now seems to be the well established doctrine that the testimony of a deceased witness, given on a former trial between the same parties, on the same issue, when offered may be contradicted or impeached, the same as if the witness was present and before the court. The witness being dead the foundation for impeachment, on account of newly discovered evidence against him cannot be laid, and, in all such cases, the law, in its wisdom, lays the foundation for impeachment, or considers the same laid, and permits impeaching questions to be asked of witnesses who were not before the court, and were not known to the parties at the time deceased witnesses, whose testimony is subsequently sought to be used, were examined.

If the testimony of S. L. James and O. H. Violet was competent its exclusion was reversible error; for the exclusion of proper testimony is always ground for reversal. See Estate of Toomes 54, Cala. 509.

In the fourth specification of error it is claimed that the verdict does not support the judgment. The basis for this claim is that in as much as the indictment

was for murder it included, as the court charged, lesser offenses, to which a punishment much less severe and somewhat less painful than death could be attached.

The presumption being that the jury intended to find the plaintiff-in-error guilty of the least offense charged, the court erred in giving him a sentence merited only by the most serious allegations.

The attention of the court is called, especially, to the fact that in his motions for a new trial, and in arrest of judgment, the plaintiff-in-error called the gaze of the court below to the error here complained of. Some of the questions arising, in the Kansas case below first cited, are thus eliminated from the consideration of this. It would seem that even if the verdict can be permitted to stand, the judgment of the court below should be reversed, and the lower court instructed to pass sentence on the plaintiff-in-error for the lesser offense charged in the indictment.

See State of Kansas vs. William Jennings 24 Kansas Reports page 460, Star page 642, reprint.

State of Kansas vs. Joseph W. Reddick, 7th, Kansas page 94, Star page 144, reprint.

McGee vs. State 8 Mo, 495. State vs. Upton 20 Mo, 400.

State vs. Redman, 17 Iowa, 329. Tully vs. People, 6 Mich., 273.

Slaughter vs. State, 24 Texas, 410.

As the fifth specification of error, admitting that the Court of the District of Kansas had jurisdiction to try this case, at all, we think the indictment which was returned to the court below—the District Court for the Second Division of Kansas—was for a capital offense, should have been remitted to the Circuit Court for trial under the provision of Section 1039, Revised Statutes of the U. S., as follows: "Sec. 1039. Every indictment of

a capital offense presented to a District Court together with the recognizance taken therein, shall by order entered on its minutes, be remitted to the next session of the Circuit Court for the same district and on the filing of said such order and indictment with the Clerk of said Circuit Court, that court shall proceed therein, in the same manner as if said indictment had been found and presented therein."

The act of January 6th, 1893, on page 389, vol. 1, Supplement, Revised Statutes of the United States, gave the District Court at Wichita, "exclusive original jurisdiction" of offenses in this part of the Indian country. There was not, and has never been, any grant of circuit powers to the court, however, and we submit that a proper construction of the section referred to, and the one first referred to, 1039, would be to hold that all indictments for offenses in the Indian country must be first presented to the District Court in virtue of its exclusive original jurisdiction; but when so presented indictment for capital offenses should be remitted for trial to the Circuit Court under 1039.

The act of January 6th, 1883, attached the Indian country to the District of Kansas by its first section. When that was done, it was not necessary to go any further in order to give the United States Court jurisdiction; but Wichita being the nearest point at which the District Court was held, for convenience and economy, it was thought best to vest original jurisdiction in that court, and we think that was all Congress intended to, or did do. To say more is to admit that it was the intention to give the District Court, Circuit Court powers, and that over only a portion of the district.

As to the sixth specification, the record shows the offense to have been committed in the Indian country—that country was created the Territory of Oklahoma by the act of May 2nd, 1890.

The indictment was found at Wichita, Kansas, in September, 1891. We submit that the plaintiff-in-error had a right to be tried by the Courts of Oklahoma. The act of May 2nd, 1890, organized a judiciary of Oklahoma and provided for three judicial districts therein. It is true that the act in question specifically provides that "all offenses committed prior to its passage shall be prosecuted in the court which had jurisdiction the same as if the act had not been passed;" but in the face of the constitutional direction, that trial shall be had in the State and District wherein the offense was committed, it would seem that Congress was powerless to give effect to the saving clause above referred to.

As to the seventh specification of error, we contend that the District Court of the District of Kansas never had jurisdiction over the country in which the offense was committed, after the passage of the Act of Congress of June 9th, 1890, vol. 1, Supplement of the Revised Statutes of the United States, page 744 dividing and reorganizing the District of Kansas.

Prior to the passage of this act the State of Kansas was one district only, and by act of June 6th, 1883, on page 389, vol. 1, supplement, this portion of the Indian country was attached to the District of Kansas for judicial purposes. The act first above referred to reorganizing the District of Kansas provides that it shall consist of two divisions and that certain counties, naming them, shall constitute the first division, and that the other counties in the state, naming them, shall be included in the second division; but no where mentions the Indian country, which, had been, by prior Act, attached to the District, nor providing to what division such country should be attached, and evidently intending to repeal the former Act.

In conclusion, we ask the pardon of the court for the length of this brief, which has several times intruded

upon the domain of argument, pleading perhaps in imperfect justification the importance of the result to our client and his financial inability to permit us the opportunity of oral ~~judgment~~ argument.

We earnestly submit that the judgment of the court below should be reversed and the case remanded with directions to dismiss the case and discharge the plaintiff in error, or at least, to award him a new trial.

Respectfully submitted,

CHAS. R. REDICK,
D. C. LEWIS,
W. K. SNYDER,
Attorneys for Plaintiff-in-Error.

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Supreme Court of the United States.

No. 667.

CLYDE MATTOX, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

Supplemental Brief for Plaintiff in Error.

W. W. DUDLEY,
L. T. MICHENER,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

No. 667.

CLYDE MATTOX, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

Supplemental Brief for Plaintiff in Error.

On the trial of this case the Government proved that two of its witnesses on the first trial, Thomas Whitman and George Thornton, had died subsequently thereto (Record, pp. 13 and 32). The Government also proved that the testimony of those witnesses had been taken by a stenographer (Record, pp. 11 and 30). Then the Government, over the objection of the defendant, introduced in evidence the transcribed notes of the testimony of the two deceased witnesses (Record, pp. 13 and 31). To the action of the court in admitting such transcripts in evidence the defendant at the time objected and excepted (Record, pp. 13 and 32). On the first trial the witness Thomas Whitman testified that he saw the defendant fire the fatal shots (Record, p. 16), and

the witness George Thornton testified to other material matter. (Record, pp. 33 to 36.)

I.

It is guaranteed by the sixth amendment to the Constitution of the United States that "in all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him." In passing on a similar provision in the constitution of North Carolina the supreme court of that State, in the case of *The State vs. Thomas*, 64 N. C., 74, said:

"We take it that the word *confront* does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmance of the rule of common law that, in trials by jury, the witness must be present before the jury and the accused so that he may be confronted—that is, put *face* to *face*."

And in *Bell vs. State*, 2 Tex. Ct. App., 216 (S. C. 28, Am. Rep., 429), in considering a like constitutional provision, the court held that a written statement of facts signed by counsel could not be allowed to go to the jury as evidence because to admit it would be to violate the constitutional provision, and in conclusion said:

"The State exacts strict obedience to her penal laws; so ought she strictly to observe the rules she has laid down to try and punish those who violate them."

In State *vs.* Atkins, 1 Overton (Tenn.), 229, the court, in denying the admissibility of the former evidence of a deceased witness, said:

* * * "It seems to us that it would be dangerous to liberty to admit such evidence. It would go a great length

in overthrowing this wise provision of the Constitution. * * * The evidence cannot be received."

One of the earliest cases in this country insisting upon the right of the defendant to be confronted in court with the witnesses against him, and denying that the former evidence of a deceased witness could be used against the defendant on a subsequent trial, is *Finn vs. Commonwealth*, 5 Randolph (Va.), 701. That case and *State vs. Atkins* were cited with approval in *People vs. Newman*, 5 Hill (N Y.), 295, where the same doctrine is announced. To the like purport are *Mendum vs. Commonwealth*, 6 Randolph (Va.), 704; *Bragg vs. Commonwealth*, 10 Grat. (Va.), 722; *State vs. Campbell*, 1 Rich. (S. C.), 124.

The reason for the rule is admirably expressed in *State vs. Thomas*, 64 N. C., 74, in which the court said:

"To make this proof the presence of the witness was necessary, (1) that he might be put under the obligation of an oath; (2) *that the jury might note his looks and demeanor;* (3) *that the defendant might confront him with other witnesses*, and (4) that the defendant might cross-examine him."

All these things can take place only when the constitutional guaranty is strictly complied with. To admit the former evidence of a deceased witness, even if he had been sworn and cross-examined in open court, would meet with but two of the requirements above enumerated, leaving unfulfilled the other requirements that the jury might note the "looks and demeanor" of the witness, and that "the defendant might confront the witness with other witnesses." In the case at bar the jury did not have the privilege of observing the looks and demeanor of the witnesses whose testimony was read to them, and the defendant was deprived

of the right of confronting the witnesses with other witnesses for the purposes of identification, as well as for the laying of the ground-work of contradiction or impeachment. This case, then, clearly presents the wisdom and justice of the constitutional guaranty and emphasizes the hardship inflicted upon the accused in the application of the rule as modified by some of the later decisions, for there are authorities holding that the former testimony of a deceased witness is admissible in evidence, if he had been sworn and if the accused had cross-examined him. This modification of the old rule is directly opposed to the constitutional guaranty which we have quoted, and it withholds from the accused the two resultant privileges or safeguards, as above stated.

II.

Even if the evidence by the deceased witness was properly admitted by the trial court, yet that court erred in refusing to admit the testimony of the witnesses Violet and James to the effect that Whitman, the deceased witness, had stated to them out of court, after the former trial, that his testimony had been given under threats made to him in the court-house just previous to being called to the witness stand, and that, had it not been for such threats, his testimony would have been different, for what he had sworn to was not true (Record, pp. 41 and 42). The record shows (pp. 41 and 43) that the Government objected to this evidence on the grounds that the deceased witness, Whitman, had been cross-examined on the former trial; that the questions could not be propounded to him on the trial in progress for the purposes of impeachment, and that the Government had no way to contradict the statement.

For the absence of the witness Whitman the defendant was in nowise responsible, as in *Reynolds vs. U. S.*, 98 U. S., 145, 158, and the Government should not have prevailed, because it could not contradict the evidence. Neither was the objection a valid one, that these questions could not be propounded to the deceased witness on the trial then in progress for the purpose of impeachment. Had he been a *living* witness, such questions could have been put to him by the accused, and, if his answers had been in the negative, the other living witnesses could have been put upon the stand and their evidence produced; but, because of the death of the witness Whitman, his former evidence was allowed to be read to the jury, who did not have the advantage of seeing and hearing him testify, while the accused did not have the benefit of additional cross-examination or of asking questions for laying the grounds of impeachment or contradiction. These great disadvantages he was made to labor under, *although his life and liberty were then imperiled*, in order that the Government might not be put to the disadvantages incident to its inability to contradict Violet and James by the evidence of Whitman. The conviction of the accused was thus made certain simply because the Government could not successfully contradict two living witnesses, although it could have cross-examined them, and had the right to impeach their character or credibility. The case is a strikingly singular one; it tests in the sharpest way the wisdom and justice of the constitutional guaranty and proves the great danger of following those cases which have undertaken to modify the old rule.

Counsel for the United States insists that as the impeaching questions had not been put to the deceased witnesses,

Whitman and Thornton, the necessary foundation had not been laid for the impeachment, and that the court ruled correctly in refusing to allow the living witnesses to testify. *That rule only obtains where the witness is alive*, and its purpose is to test the conscience and recollection of the witness before the impeaching witnesses are put upon the stand, to the end that complete justice may be done parties and witnesses.

The purposes of the rule were fully stated in *The Queen's Case*, 2 Brod. & Bing., 313, 314, quoted at some length in 1 Greenleaf on Evidence, 14th edition, sec. 462, note 1. It is clear that the rule was made for and applies to *living witnesses only*. It cannot and does not apply to *deceased witnesses*, whether testifying, as in this case, or by means of depositions. Although we have made a careful search, we have not been able to find a reported case in which there was a consideration of the question which we are here discussing. We believe that we are entirely safe in making the assertion that this question is here presented for the first time to a court of last resort, and that this Court is now called upon to create and establish a rule for the government of this case and of others of like character in the future.

We submit that a case of this character, involving as it does a question of such vital importance and upon which there is no authority, is pre-eminently one which invokes the application of the rule that the prisoner is entitled to be presumed innocent until his guilt shall have been established beyond a reasonable doubt.

Counsel for the United States insists (pp. 3 and 4 of his brief) that the defendant had ample opportunity on the trial, which he says occurred in September, 1891, to cross-

examine the witness Whitman about the conversations with Violet and James. The record shows (p. 12) that the testimony on the first trial was taken at the September term of the court, 1891. The widow of the defendant Whitman testified that he died January 15, 1893 (Record, pp. 13 and 14). The question put to the witness Violet on page 42 asks about a conversation with Whitman "on the 21st day of January, 1891," concerning a "declaration relating to the testimony which he had *previously* given in the case against Mattox," so even if the date of January 21, 1891, was wrong it is clear that the conversation proposed to be testified about was concerning "the testimony which he had *previously* given in the case against Mattox." But even if the questions to the witness Violet were fatally defective there can be no doubt that the question put to the witness James was absolutely accurate, because that witness was asked about conversations had with Whitman November 29 and 30, 1892. Therefore we insist that the objections urged by counsel for the Government are not well taken.

We respectfully submit that the judgment of the court below should be reversed in all things.

W. W. DUDLEY,
L. T. MICHENER,
Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 667.

CLYDE MATTOX, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

Additional Authorities for Plaintiff in Error.

I.

That the evidence of the stenographer, Tracy, does not lay a sufficient foundation for the introduction of the former testimony of the deceased witnesses, Whitman and Thornton, see

U. S. *vs.* Wood, 3 Washington C. C., 440.
Waters *vs.* Waters, 35 Maryland, 531.
1 Greenleaf on Evidence, section 166.

II.

That the testimony of a deceased or absent witness may be impeached without first laying a foundation therefor by

questions asked the witness, when the contradictory statements were made by the witness *after* the termination of his testimony, see

Roberts *vs.* Collins, 6 Iredell, 223.
Hooper *vs.* Moore, 3 Jones, Law R., 429.
Fletcher *vs.* Henley, 13 Louisiana Ann. Rep., 192
Tucker *vs.* Welsh, 17 Massachusetts, 167.
Downer *vs.* Dana, 19 Vermont, 347.
American and English Encyclopædia of Law, vol. 7, page 110, paragraph *m*.

L. T. Michener,
Arthur S. Browne,
Of Counsel.

Washington, D. C., *October* 23, 1894.

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In the Supreme Court of the United States.

OCTOBER TERM, 1894.

CLYDE MATTOX, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 667.

BRIEF FOR THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

CLYDE MATTOX, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 667.

BRIEF FOR THE UNITED STATES.

On the 16th day of January, 1894, Clyde Mattox was convicted in the district court of the United States for the district of Kansas on an indictment found at the September term, 1891, of said court, which charged that on or about the 12th day of December, 1889, within that part of the Indian Territory lying north of the Canadian River and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, the same being a place and district of country under the exclusive jurisdiction of the United States, he, the said Clyde Mattox, had killed and murdered one John Mullen.

THE CASE.

It appears from the record (p. 43), that a part only of the evidence offered and introduced on the trial is certified by the judge in the bill of exceptions; that many other witnesses, including the accused himself, were examined on the trial, but neither their testimony nor the facts proved by them are embraced in the bill of exceptions. It will become unnecessary, therefore, to refer at all in the argument to the facts of this case under those assignments of error, which charge that the verdict was contrary to the evidence.

Taking up these assignments of error as they appear on page 52 we may consider them in the order in which they are there stated.

(1) The refusal of the court to quash the indictment.

This will be considered in treating of the other assignments which relate to the jurisdiction of the court.

(2) The refusal of the court to sustain the demurrer to the indictment.

No specific ground of demurrer appears in the record, and the indictment seems to contain an adequate charge of every material element of the defense.

(3) The refusal of the court to allow the witness O. H. Violet to answer the question propounded to him on behalf of the accused.

The question, which is a lengthy one, will be found on page 42, and the object of it appears to have been to show by the witness that Tom Whitman, who had been regularly examined as a witness called by the Government, had subsequently stated to the witness Violet that the tes-

timony which he, Whitman, had delivered was false and had been given under duress.

The attorney for the United States objected to the question on the ground that it was irrelevant in this, that its object was to impeach the testimony of the witness Whitman without having first laid the foundation for such impeachment.

Whitman had been examined as a witness on behalf of the Government at a former trial of the accused under this indictment, and had then been thoroughly cross-examined by defendant's counsel. His testimony had been taken down by a stenographer at the time—a typewritten copy made of it.

Whitman had died since the previous trial, and his testimony on the former trial had been offered and admitted in evidence before the jury at the present trial.

If the defendant had proposed to impeach his testimony by proving that he had made statements out of court contrary to those made upon the witness stand, it was necessary for the protection of the witness sought to be impeached that he should have been interrogated on that subject when on the stand, that an opportunity might be afforded him of denying or explaining the facts charged against him.

If it be said in reply to this that such a course was impossible from the fact that Whitman did not make such contrary statements until after he had left the witness stand, it will be sufficient to refer to the record, from which it appears (p. 42) that the statement which Whitman was alleged to have made to Violet was on the 21st

day of January, 1891; whereas the only testimony which this record shows to have been delivered by Whitman as a witness on the trial of the accused was in September, 1891. (See pp. 12–14.)

So that the testimony of Whitman referred to in the question propounded to Violet must have been delivered on some preliminary occasion prior to September, 1891. The amplest opportunity, therefore, had been afforded the accused of interrogating the witness Thomas Whitman, when he was examined in September, 1891, as to the statement alleged to have been made by him to Violet in January, 1891. And this not having been done, and the foundation, therefore, not having been laid for this impeachment, the ruling of the court in refusing to allow the witness to answer the question was plainly right.

(4) The refusal of the court to allow the witness James, called on behalf of the accused, to answer the questions put to him by counsel for the defendant. (The question will be found on p. 41.)

The objection to this question rests in part on the same ground as that of the question put to Violet, to wit: that it is an attempt to impeach a witness by proof of contradictory statements made by him after the witness is dead and unable to deny or explain.

(5) To the ruling of the court in admitting in evidence on behalf of the United States proof of testimony delivered at a former trial of the accused under this indictment by a witness who had since died.

It is true that under Article VI of the Constitution of the United States, "the accused shall enjoy the right to be confronted with the witnesses against him."

But it has been repeatedly held by the courts, State as well as Federal, and recognized by the text writers, that this requirement of the Constitution is fully complied with when a witness whose testimony is sought to be introduced had been examined in open court at a former trial, in the presence of the accused, and cross-examined on his behalf. (*United States* v. *Reynolds*, 98 U. S., 158; 1 Bish. Crim. Prac., sec. 1195 and cases cited; 1 Greenlf. on Ev., sec. 163, and note 15th ed.; *People* v. *Dirine*, 46 California; *Meyer* v. *Roth*, 51 California, 582.)

(6) To the ruling of the court in admitting the testimony of George Thornton, who had been called and examined as a witness on behalf of the Government at a former trial of the accused under this indictment, and who had since died, but whose testimony had been taken down when delivered, and duly authenticated and proven on the trial of this cause. The same argument applies here as stated above.

(7) To the refusal of the court to grant the instructions asked for on behalf of the accused and found (pp. 43–45).

The reason given by the judge who presided at the trial for declining to grant the instructions in the form in which they were presented was that the subject-matter of these instructions was fully incorporated in the charge delivered by the court to the jury (pp. 45–48), and that it was needless to embarrass the jury by repetition.

It will be found, upon comparing the instructions asked with the charge delivered, that they are substantially the same, only more amplified and elucidated in the charge.

(8) To the action of the court in overruling the motion for a new trial.

This is a matter which this court will not consider.

(9) To the action of the court in denying the motion in arrest of judgment.

This is embraced in the consideration of the other assignments of error.

(10) To the refusal of the court to remit the indictment to the circuit court under section 1038.

That is a matter altogether within the discretion of the district court and is not a proper subject for review by this court.

(11 and 12) These assignments deny the jurisdiction of the district court of Kansas on the grounds that the offense was not committed in the district of Kansas, but was committed in the district of Oklahoma; and, also, that under the act of Congress establishing the territory of Oklahoma the U. S. court for the district of Kansas had been deprived of jurisdiction over offenses committed within the Territory of Oklahoma.

To which we reply:

(1) That it is shown by the testimony of George Thornton that he was a deputy U. S. marshal under Marshal Jones in the district of Kansas and the Indian Territory (p. 33); that he had been familiar with the region of country since 1888; and that "the land where the killing occurred is now in a Territory under the jurisdiction of this court" (p. 35).

But the act creating the Territory of Oklahoma and providing for the repeal of all acts conferring jurisdiction

on U. S. courts contains this explicit proviso (26 Stat., p. 86):

> But all actions commenced in such courts and *crimes committed* in said Territory, and in the Cherokee Outlet, *prior to the passage of this act*, shall be tried and prosecuted and proceeded with until finally disposed of, in the courts now having jurisdiction thereof, as if this act had not been passed.

HOLMES CONRAD,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1894.

CLYDE MATTOX, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 667.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

APPELLEE'S REPLY TO ADDITIONAL BRIEF OF PLAINTIFF IN ERROR.

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THE TESTIMONY OF H. B. TRACY WAS ADMISSIBLE BOTH AS TO SUBJECT-MATTER AND THE MEANS OF PROOF.

The witness Tracy proved (p. 12) that as official stenographer he had reported the testimony of Thomas Whitman, given at the previous trial, at September term, 1891; that Whitman had been then sworn, examined, and cross-examined in the presence of the accused; that witness had compared the transcript of the testimony offered here

(which had been prepared by a lady who reported the testimony for the defendant) with his own stenographic notes of the testimony and testified that such transcript "is a correct transcript of his evidence."

It also appears on page 13 that the transcript here identified by Tracy had been filed in this court on December 2, 1891, as part of a bill of exceptions, and, as such, formed part of a transcript of the entire record, upon which an appeal had been allowed to the Supreme Court of the United States and upon which that court had heard and decided this case. This would seem to be a sufficient authentication of the paper as a true and correct statement of the testimony delivered by Whitman at the previous trial of this cause.

The very question appears to have been considered by the supreme court of the State of Missouri in 1877, in *The State* v. *Able*. (65 Mo. R., 371.) There the evidence of one Holliday, who had been examined as a witness in a former trial, had been preserved in a bill of exceptions taken in that trial. The witness had since died and at this second trial that bill of exceptions was offered as evidence to the jury of Holliday's testimony at the former trial. Judge Cravens, who presided on the first trial and heard the witness Holliday testify, and who signed the bill of exceptions containing his evidence, was introduced as a witness. The bill of exceptions taken on the former trial was handed to him and he was asked if it contained the substance of the evidence of the witness. He replied that he thought it did; and further said:

> If he had been asked to state the substance of the testimony of said witness, without the bill of excep-

tions having been shown him, or his attention in some way called to it, he could not have given the substance of it.

Norton, J., speaking for the entire court, said :

Taking, then, this view of it, the question arises, was the evidence of Holliday, given on the former trial as preserved in the bill of exceptions, so identified as to allow it to go to the jury as his evidence? * * * The essence of the decision, and the principle to be deduced from it is, that whenever the evidence of a witness in a criminal case has been given in a court, whether it be an examining or trial court, and such evidence has been given in the presence of the accused on his trial, and the witness dies between the former and any subsequent trial, the evidence given by him on the former trial may, when proved, be given on a subsequent trial of the same charge, whether it rests in the knowledge of witnesses *or is preserved in writing in some manner authorized by law.*

It having been thus definitely settled that the evidence of a witness given on a former trial, under the above circumstances, may be used on a subsequent trial, when the witness has died in the meantime, the question arises how may it be proved. In the case of the *United States* v. *Macomb* (5 McLean, C. C., 286) Judge Drummond held that when a witness since deceased had testified at the preliminary examination in relation to the offense, in the presence of the accused, witnesses will be permitted to prove what the deceased witness had testified to at such examination, and that so far as it related to such proof, the rules of evidence were the same in criminal as in civil cases. The conclusion was reached in that case, after an examination of the authorities, that the evidence of a deceased witness might be proved in a criminal case *in the same manner* that it